BEFORE ARBITRATOR MICHAEL ANTHONY MARR

STATE OF HAWAII

In the Matter of the Arbitration Between	)	GRIEVANCE OF GORDON LESLIE
UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,	)	DECISION AND AWARD
Union,	)	HEARING DATES: May 23, 24, 25, 2005 and June 2 and 7, 2005
and	)	
STATE OF HAWAII, DEPARTMENT OF PUBLIC SAFETY,	)	
Employer.	)	

DECISION AND AWARD

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BEFORE ARBITRATOR MICHAEL ANTHONY MARR, ESQ.

STATE OF HAWAII

In the Matter of the Arbitration Between	)	GRIEVANCE OF GORDON LESLIE
UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,	)	DECISION AND AWARD; CERTIFICATE OF SERVICE
Union,	)	
and	)	HEARING DATES: MAY 23, 24, 25, 2005 AND JUNE 2 AND 7, 2005
STATE OF HAWAII, DEPARTMENT DEPARTMENT OF PUBLIC SAFETY,	)	
Employer.	)	

DECISION AND AWARD

The above-referenced matter came on for hearing before this Arbitrator on May 23, 24 and 25 of 2005 and June 2 and 7 of 2005. (See transcript of proceedings, hereinafter sometimes referred to as "Tr" or by the witness's last name followed by the transcript page number). Both parties were zealously and competently represented by counsel at the arbitration hearing. The United Public Workers, AFSCME, Local 646, AFL-CIO, (hereinafter sometimes referred to as AUnion@) and Sergeant Gordon Leslie (hereinafter sometimes referred to as "Grievant") were represented by STANFORD MASUI, ESQ. The State of Hawaii, Department of Public Safety (hereinafter sometimes referred to as AEmployer@), was represented by Deputy Attorney General MARIA C. COOK. Testimony from fifteen (15) witnesses was received at the arbitration hearing. The Union introduced nineteen (19) exhibits into evidence, 18 of which were received into evidence.

The Employer introduced sixteen (16) exhibits into evidence, all of which were received into evidence. In addition, the parties introduced a total of three (3) joint exhibits into evidence. Full opportunity was given to the parties to present evidence, examine and cross-examine witnesses and to present oral argument. The parties agreed that they would submit their post hearing briefs on or before August 15, 2005. They also agreed that this Arbitrator=s decision would be due on or before September 28, 2005.

This Arbitrator has reviewed the testimony and evidence presented during the Arbitration hearing on this matter as well as reviewed the extremely well-written and convincing briefs submitted by counsel on behalf of their clients. Several arguments have been made by Counsel. As a general rule, this Arbitrator will address only those facts and issues that are relevant to this decision and will not comment on matters that he believes are irrelevant, superfluous, redundant, or rendered moot by this decision.

I. <u>CONCISE STATEMENT OF EMPLOYER=S POSITION</u>.

The Employer maintains that it has not violated the Collective Bargaining Agreement (hereinafter sometimes referred to as ACBA@) by suspending Grievant for 10 days. The Employer further maintains that the 10 day suspension is consistent with the "just and proper cause" prerequisite to disciplinary action.

II. <u>CONCISE STATEMENT OF UNION=S POSITION</u>.

The Union asserts on behalf of the Grievant that the Employer has violated the CBA by suspending Grievant for 10 days. The Union also asserts that the Grievant's actions are justified by "past practice," "lax enforcement of rules," and the Employer's failure to consult with the Union concerning its contraband policy. The Union further asserts that the suspension be set aside, that Grievant be made whole, that the Employer remove

all related documents and notes from all personnel and employment files of the Grievant, and that the Employer comply with Sections 11, 14, and 58 of the CBA.

III. STIPULATED ISSUES.

Shortly before the beginning of this Arbitration hearing, this Arbitrator, this Arbitrator read into the record the stipulations and agreements of the parties as set forth in his letter to counsel for the respective parties, dated April 8, 2004. They are set forth below as follows:

1. The parties stipulated that prior steps to the grievance process have been met or waived;

2. The parties stipulated that the issues set forth below are arbitrable before this arbitrator:

a. Whether the Department of Public Safety, State of Hawaii (Employer) violated, misapplied, or misinterpreted the terms of the Unit 10 Collective Bargaining Agreement; specifically, sections 11, 14 and 58 when it suspended Grievant for 10 days?

b. If so, what are the appropriate remedies?

3. The Employer shall have the burden of proof.

Joint Exhibit 2.

IV. THE FACTUAL BASIS FOR THE EMPLOYER'S DISCIPLINARY ACTION.

The factual basis for the charges against Grievant are set forth in Employer's Exhibit 3, a suspension letter to Grievant from Director John Peyton, Jr, dated July 2, 2004. The factual basis is as follows:

On April 1, 2004, you were the Module 3 Sergeant (supervisor) for the

Second Watch. You as the supervisor knowingly allowed your subordinate staff to possess and utilize contraband items in the housing unit, which is contrary to departmental policies and rules. You allowed your subordinate staff to bring in excess items to cook in the housing unit with contraband items such as a hot plate and a pan.

V. RELEVANT CONTRACTUAL PROVISIONS.

Joint Exhibit 1 was received into evidence as the CBA between the Employer and the Union. Section 11 of the CBA concerns discipline. It provides in relevant part as follows:

> 11.01a A regular Employee shall be subject to discipline by the Employer for just and proper cause.
>
> 11.01b An Employee who is disciplined, and the Union, shall be furnished the specific reason(s) for the discipline in writing on or before the effective date of the discipline except where the discipline is in the form of an oral warning or reprimand. However, if the oral warning or reprimand is documented or recorded for future use by the Employer to determine future discipline the Employee who is disciplined shall be furnished the specific reason(s) for the oral warning or reprimand in writing.
>
> 11.01c When an Employee is orally warned or reprimanded for disciplinary purposes, it shall be done discreetly to avoid embarrassment to the employee.

Section 14 concerns prior rights, benefits, and perquisites of the CBA. It provides in relevant part as follows:

> 14.01 Nothing in this Agreement shall be construed as abridging, amending or waiving any rights, benefits or perquisites presently covered by the constitutions, statutes, or rules and regulations that Employees have enjoyed heretofore, except as expressly superseded by this Agreement.

Lastly, Section 58 concerns the Employee's Bill of Rights. It provides in relevant part as follows:

> 58.01 STATEMENT.
> No Employee shall be required to sign a statement of complaint filed against the Employee.

58.02 INVESTIGATION.

58.02 a. If the Employer pursues an investigation based on a complaint, the Employee shall be advised of the seriousness of the complaint.

58.02 b. The Employee will be informed of the complaint, and will be afforded an opportunity to respond and/or refute the complaint.

58.03 When investigating complaints against Employees by patients, inmates and residents, weight shall be given to the mitigating circumstances, including the difficulties or working with some types of patients, inmates and residents.

58.04 Before making a final decision, the Employer shall review and consider all available evidence, data, and factors supporting the employee, whether or not the Employee provides facts in defense of the complaint.

58.05 In the event the complaint is not substantiated or the Employee is not disciplined, the complaint and all relevant information shall be destroyed, provided that the Employer may retain a summary of such information outside of the official personnel file whenever such complaint may result in future liability to the Employer, including but not limited to, discrimination complaints.

VI. RELEVANT PORTIONS OF THE STANDARDS OF CONDUCT.

The cover page of the Standards of Conduct provides as follows:

Pursuant to the authority vested in the Director, Department of Corrections, and his designated subordinates, by Hawaii Revised Statutes, Section 26-38, the following Standards of Conduct are published for the control, disposition, and government of the employees of the Department of Corrections.

These Standards of Conduct are effective August 1, 1988.

All previously enacted rules or policies which apply to the control, disposition, and government of the employees of the Department of Corrections, and which are in conflict with the provisions of these standards, are hereby rescinded. This action does not apply to the “Inmate Handbook” published under Title 17, Administrative Rules of the Corrections Division.

Article III of the Standards of Conduct is entitled “Conduct.” Section I

provides as follows:

> A. Disciplinary action for violations contained in Section II of this Article shall be determined by the Director of Department of Corrections and/or the Administrators.
>
> B. Disciplinary action for violations contained in Section III of this Article shall be subject to progressive discipline, except where the severity of a single violation may warrant immediate discharge. Disciplinary action(s) shall be taken pursuant to the applicable sections of the bargaining unit agreements.

Grievant was alleged to have violated several provisions of the Standards of Conduct. These provisions are set forth as follows:

> Article III Section II Professional Conduct and Responsibilities, C. Cooperation – Cooperation between employees and elements of the Department is essential for effective correctional attainment. Therefore, all employees are strictly charged with establishing and maintaining a high level of cooperation.
>
> Article III Section II Professional Conduct and Responsibilities, E7. General Responsibilities - Correctional employees shall at all times take appropriate action to identify potentially dangerous and/or serious security situations or problems.
>
> Article III Section II Professional Conduct and Responsibilities, E10 General Responsibilities – Correctional employees shall at all times take appropriate action to enforce all Federal and statutory law violations as well as departmental and branch Rules, Directives, Policies and Procedures, and these Standards of Conduct and report any violations thereof.
>
> Article III Section II Professional Conduct and Responsibilities, G Knowledge of Law and Regulations – Correctional employees are expected to know those Statutes of the State of Hawaii, Administrative Rules, Standards of Conduct, and Policies and Procedures of the Department which are applicable to their functions as correctional employees. In the event of improper actions or breaches of discipline, it will be presumed that the employee was familiar with the law, rule, or policy in question. They shall seek information through superiors or fellow employees on matters which they have questions or doubts.
>
> Article III Section II Professional Conduct and Responsibilities, H Performance of Duty – Corrections Officers and employees shall perform

their duties as required or directed by law, departmental rules or policies, or by order of a supervisor. All lawful duties required by competent authority shall be performed promptly as directed, notwithstanding the general assignment of duties and responsibilities.

Article III Section II Professional Conduct and Responsibilities, I Obedience to Laws and Regulations – Corrections Officers and employees shall observe and obey all laws, Administrative Rules, Policies and Procedures, and Standards of Conduct of the Department.

Article III Section III Rules C Class Rules C4 Conduct Towards Superiors, Subordinates, and Associates – Employees shall treat superiors, subordinates, associates with respect. They shall not be insubordinate to superiors or supervisors. [1]

VII. BACKGROUND

Clayton Frank (hereinafter sometimes referred to was "Warden Frank") was transferred to the Halawa Correctional Facility (hereinafter sometimes referred to as "HCF") and became the Warden of said facility on April 23, 2003. Frank at 43. Prior to this transfer, Warden Frank served as Warden at the Oahu Community Correctional

[1] The Employer submitted a substitute Employer's Exhibit 7 along with its post-hearing brief. The Employer indicated that the Employer's Exhibit 7 that was introduced and accepted into evidence had several pages missing due to a copying error. Employer's Post-Hearing Brief at footnote 2. The Employer's Exhibit 7 that this Arbitrator accepted into evidence evidently is not a complete copy as it consists of a cover page and pages numbered 4, 5, 8, 9, 12, 13, and 16. As a general rule, a court of law, or for that matter an Arbitrator should can only consider what has been accepted into evidence. *See In the Matter of Arbitration Between Carrol and Traivs*, 81 Haw. 264, 915 P.2d 1365 (1996); *Stewart v. Smith*, 4 Hawaii App. 185, 662 P.2d 1121 (1983); *McAulton v. Stewart*, 54 Haw. 488, 510 P.2d 93 (1973); 42 *Federal Labor Relations Authority No. 89, American Federation of Government Employees, Council of Prison Locals, Local 919 v. Federal Bureau of Prisons* (1991). However, the parties agree that the Standards of Conduct clearly exist. The dispute is whether they are applicable to Grievant. The Standards of Conduct are referred to throughout the testimony of the of the witnesses, cited in the numerous exhibits introduced by the parties, and referenced by the parties in their respective post-hearing briefs. A partial copy of the Standards of Conduct was also received into evidence as Union's Exhibit 15-11. Therefore, pursuant to Rule 201 of the Hawaii Rules of Evidence, this Arbitrator will take Judicial Notice of the "substitute" Standards of Conduct that was submitted with the Employer's Post-Hearing Brief. This Arbitrator will sometimes refer to Standards of Conduct as Employer's Exhibit 7a. It is significant to note that Judicial notice may be taken at any stage of a proceeding, including the appellate level. In *In Application of Pioneer Mill Co.*, 53 Haw. 496, 497 P.2d 549 (1972), the Hawaii Supreme Court held that an appellate court may take judicial notice of a fact despite the failure of the trial court to do so. In addition, an appellate court may take judicial notice of files and records of a case on appeal such as a transcript not put in evidence in the trial court, but which is part of the record on appeal. *State v. Schmidt,* 70 Haw. 443, 445, 774 P.2d 242, 244 (1989). Similarly, a court may take judicial notice of its own records in an interrelated proceeding where the parties are the same; a court is mandated to take judicial notice if requested by a party and supplied with a copy of the necessary information. *State v. Akana*, 68 Haw. 164, 165-166, 706 P.2d 1300, 1302 recon. denied, 68 Haw. 688, 706 P.2d 1300 (1985). Also, judicial notice can be taken of the entire record in the circuit court in a related appeal involving the same real property that is the subject of the instant case. *Southwest Slopes, Inc. v. Lum*, 81 Haw. 501, 509, 918 P.2d 1157, 1165 (Haw. App. 1995) This Arbitrator's decision to sua sponte take judicial notice of the Standards of Conduct is also supported by the fact that the Standards of Conduct have been used in previous disciplinary matters in the State of Hawaii concerning corrections divisions of the Department of Public Safety, i.e., *State of Hawaii, Department of Public Safety, Maui Community Correctional Center v. United Public Workers* (Grievance of Aliksa) (Tsukiyama, 1997); *United Public Workers v. State of Hawaii, Department of Public Safety, OCCC* (Grievance of Thomas Lepere) (Nicholson, 1997); *United Public Workers v. State of Hawaii, Department of Public Safety, Waiawa Correctional Facility* (Grievance of Lisa Naone) (Higa, 2004).

Center beginning in June of 1999. Frank at 44. Prior to being Warden at the Oahu Community Correctional Center, he served as the Institutions Division Administrator for the Department of Public Safety. In this capacity, he was in charge of all eight correctional facilities for the State of Hawaii. *Id.*

HCF serves as a maximum security prison for "long term" sentenced felons and inmates who are deemed "dangerous." Warden Frank was transferred to HCF after the escape from said facility by three felony inmates (hereinafter sometimes referred to as the "Bartalona Escape"). Frank at 48. One of the reasons Warden Frank was transferred to HCF was to investigate security breaches that occurred because of the Bartalona Escape, to determine if policies and procedures were being followed or needed to be updated, if security measures needed to be updated, and if officers and staff were being complacent in their responsibilities and following polices and procedures. *Id.*

After Warden Frank was transferred, he was advised that a correctional officer (ACO Moisa) and an attorney (Steven Leong) were involved in the promotion and introduction of contraband into HCF (hereinafter sometimes referred to as the "Moisa Contraband Incident"). Frank at 48-49. Moisa initially brought in small items such as meals from Burger King and McDonalds. *Id*. The contraband escalated to shorts and later to escalated to drugs. *Id.* Warden Frank, in part because of the Moisa Contraband Incident, the Bartalona Escape, and the issue of contraband, ordered a "total shakedown" at HCF in early May 2003. Frank at 50.

On February 2, 2003 and February 16, 2003, Warden Frank personally met with Grievant to discuss issues concerning "Post Orders, Staff Investigations and

Contraband Issues." Each meeting last approximately 15 minutes. Union's Exhibits 6-6 and 11-1. However, the evidence does not indicate which contraband issues were discussed.

On May 15, 2003 Warden Frank also held a meeting for 2nd Shift Lieutenants/Sergeants/Chief of Security. This meeting lasted for approximately one hour. At this meeting, Warden Frank again discussed security and contraband issues. Grievant was present at work on the day that this meeting was held. Union's Exhibits 6-6 and 11-1. The nature and extent of the discussion on contraband issues is not clear from the record.

Warden Frank, in August of 2003 directed Captain Paleka to do a walk-through of HCF for the purpose of confiscating items that were considered contraband. Captain Paleka testified that he did not see any hot plate during his inspection of module 3. Frank at 33 and Paleka at 346.

On February 12, 2004 and February 13, 2004 meetings for ACOs, Sergeants, and Lieutenants were held to discuss report writing, contraband, inmate/staff investigations, post orders, policy and procedures, and open floor discussion. Each meeting lasted approximately 1 hour. Union's Exhibit 6-7. Topics of discussion included the prohibition against cooking and hot plates. Frank at 902; Paleka at 339-340. Grievant was assigned to the second watch. Frank at 903-904. Captain Dallen Paleka testified that Grievant was at one of the briefings in early February of 2004 and should have known that a hot plate was considered contraband since Grievant asked a question about cooking. Paleka at 339-340. Employer's Exhibit 16, Grievant's attendance record for 2004 indicates that Grievant was present at work on both of these

days.

On May 19, 2004 Warden Frank issued Employer's Exhibit 11 in an attempt to curb contraband. Employer's Exhibit 11 provides as follows:

> May 19, 2003
>
> TO: **ALL CONCERNED**
>
> FROM: Clayton Frank, HFW
>
> SUBJECT: **DIRECTIVE ON CONTRABAND & SEARCHES**
>
> To insure that the safety, security, and good government of Halawa Correctional Facility is being maintained, the following directive affecting staff, inmates, and visitors regarding contraband and searches is to be adhered to:
>
> CONTRABAND is anything not authorized for possession or introduction into the Facility without the authorization of the Warden or his designee.
>
> All staff, inmates and visitors are subject to SEARCHES based on reasonably suspicion, probable cause, or as part of the daily routine to pat search inmates when applicable.
>
> cc: DW-A,DW-T, COS, WATCH COMMANDERS, PCA, BOM, FOA, HEALTH CARE, FSU, SNF-BUILDING CONTROL, SCREENING DESK, GATE HOUSES, (SNF/HMSF), BULLETIN BOARDS.

Warden Frank subsequently issued another directive on July 17, 2003 concerning contraband. Employer's Exhibit 5 at 65-66. The memo (hereinafter sometimes referred to as the "CONTRABAND MEMO," provides as follows:

> July 17, 2003
>
> TO: ALL CONCERNED
>
> FROM: Clayton Frank, HFW
>
> SUBJECT: **AUTHORIZED/UNAUTORIZED ITEMS INTO A SECURED AREA**
>
> **Effective August 1, 2003 the following items are not allowed into a secured area, but not limited to being defined as contraband.**

1. Cellular phones and cellular batteries.

2. Brief cases or attaché cases larger than 18”x13”x4”

3. Thermos jugs in excess of ½ gallons, ice chests, and other containers.

4. Excessive food and snack items (more than enough for individual consumption).

5. Food or drink items for anyone but self.

6. Personal computers or computer paraphernalia.

7. Cameras and camera attachements. (digital, video etc.)

8. Backpacks, flight bags, carryalls, exercise bags, and/or similar bags except:

The following items are allowed into a secured area:

1. Female purses and male clutches (including “fanny packs”) are authorized, but must be stored at the work area and shall be subject to search upon entry and exit.

2. Case manager/UTM’s utilizing backpack style bags on wheels going to and from assigned work area. These bags shall be subject to search upon entry and exit.

Secured areas is hereby designated as the following at the:

Special Needs Facility – Entering through E-1 Door. (door from lobby outside of Building Control).

Medium Security – Entering onto Main Street from the Mainstreet Door.

These doors are designated as the official entrance and exit from the Medium and Special Needs Facility. Any other areas used to enter or exit the facility must be approved by the Warden.

Contraband is defined as any item not authorized by the facility Warden.

Failure to comply with this memo may result in disciplinary action with just and proper cause.

Recived: _____ Date. _____
Employee Signature

Witnessed: _____ Date. _____
Signature

Grievant refused to sign for receipt of this memo on July 18, 2003. [2]

Grievant was at all relevant times mentioned a Sergeant (supervisor) at HCF assigned to the Module 3 housing unit. He supervised several adult corrections officers (hereinafter sometimes referred to as "ACOs"), including ACOs Dawn Smith and Thomas Hawn.

Warden Frank and Chief of Security Major May Andrade (the latter sometimes referred to as "Major Andrade") while conducting a walk-through (hereinafter sometimes referred to as the "First Hot Plate Incident") of HCF sometime in late January or early February of 2004 observed a staff member or an inmate cooking with a hot plate in Module 3. Frank at 60; Andrade at 667-68. Grievant was admonished and warned to get rid of the hot plate. Andrade at 669. A hot plate is considered contraband. Andrade at 670. It is unclear from the testimony of Major Andrade if she informed Grievant that the hot plate was contraband although she testified that a hot plate was contraband. Andrade at 669-670. However, it is clear that Major Andrade gave Grievant a "last warning" by stating that there would be "no more warnings" to get rid of the hot plate. Andrade at 670. For a full discussion of the First Hot Plate Incident, please refer herein to Section XII.E, PROOF.

Later that same day in late January or early February of 2004, Grievant

[2] Grievant has refused to sign other documents that were introduced into evidence. As Major Andrade testified, refusal to sign a document does not imply misconduct, rather it implies that the employee is discontented with what the administration is trying to do. Andrade at 697. This is the employee's right. Id.

went to Warden Frank's office. Grievant was again was admonished and instructed to get rid of the hot plate as it was contraband. Frank at 62-63; 81-82. Warden Frank specifically informed the Grievant that the hot plate was contraband and that Grievant was to ensure that his subordinates did not use the hot plate. For a full discussion of this incident, please refer herein to Section XII.E, PROOF.

On July 1, 2004, Warden Frank conducted another walk-through of HCF (sometimes referred to herein as the "Second Hot Plate Incident"). Frank at 70-71. When Warden Frank approached Module 3A he smelled food cooking. Frank at 71. As Warden Frank entered Module 3A, he noticed ACO Hawn and two inmates. Frank at 72-74. They evidently were cooking again in the same location that cooking had occurred during the First Hot Plate Incident. Frank at 72. Grievant was again admonished by Warden Frank. Warden Frank informed Grievant that Grievant needed to submit a report concerning the incident and that Grievant needed to take care of the cooking issue. *Id.* Warden Frank then exited Grievant's office. *Id.* For a full discussion of the Second Hot Plate Incident, please refer to Section XII.E, PROOF.

Grievant submitted a report (sometimes hereinafter referred to as the "Last Supper Memo") as directed by Warden Frank. Employer's Exhibit 14-24. Grievant testified that he was not trying to be insubordinate by writing the Last Supper Memo. Leslie at 772. As per Grievant, the reference to "THE LAST SUPPER" was in reference to the meal that became the subject of this grievance being their "Last Supper" in the module. Leslie at 771. The memo provides as follows:

Thursday, April 01, 2004

TO: Warden Frank
FROM: Gordon Leslie, Sergeant Module 3

SUBJECT: THE LAST SUPPER

In light of the States financial restraints that places a burden directly to HCF food service department, unbeknownst, individual assigned provided a meal supplement enriched with vitamins and nutrient. I believe the items were hand carried in and within the allotted limits per memorandum. These officers would not bring excessive and or unauthorized items. As their supervisor they will be instruct to be more informative. We apologize if we offended anyone or breached the security of this facility.

Again, we humbly apologize and submitted this for your information.

The Last Supper Memo was rewritten by Grievant after he was informed by Captain Paleka and Major Andrade that the memo did not reflect what had occurred. Leslie at 772-773. Grievant thereafter submitted another memo which was introduced into evidence as Employer's Exhibit 5-58. It provides as follows:

Thursday, April 01, 2004

TO: Warden Frank
FROM: Gordon Leslie, Sergeant Module 3
SUBJECT: COOKING

On the above-mentioned date at approximately 0730 hours staff assigned to Module 3 was conducting the above subject. Officers apparently brought in food and decided to reheat the items. We/they did not intend to be disrespectful or insubordinate. As their supervisor I will instruct them to be more informative. I apologize for our action and will not let this happen again.

Again, we humbly apologize and submitted this for your information.

On June 2, 2004 Grievant received a "Notice of Pre-Disciplinary Due Process Hearing" from Shelly Nobriega, Hearings Officer. Employer's Exhibit 4. It is significant to note that Employees at HCF are expected to adhere to the "Standards of Conduct." Frank at 46 and Employer's Exhibits 3, 4, and 7.

On July 2, 2004, the Employer suspended Grievant for ten working days for violating certain provisions of the Standards of Conduct (please see Section VI above,

Relevant Portions of Standard of Conduct for the specific provisions). The letter of suspension sets forth the following factual findings against Grievant:

> On April 1, 2004, you were the Module 3 Sergeant (supervisor) for the Second Watch. You as the supervisor knowingly allowed your subordinate Staff to possess and utilize contraband items in the housing unit, which is contrary to departmental/facility policies and rules. You allowed your subordinate staff to bring in excess food items to cook in the housing unit with contraband items such as a hot plate and a pan.

Employer's Exhibit 3.

On August 13, 2004 Grievant submitted to the Employer a Step 1 grievance. Employer's Exhibit 1. The grievance alleged that sections 11, 14, and 58 of the CBA were violated. The step 1 grievance provides in relevant part as follows:

3. Nature of Complaint: (Date, facts, circumstances, etc.)

   This grievance is being filed on behalf of Adult Corrections Officer IV Gordon Leslie employed with the State of Hawaii, Department of Public Safety, at the Halawa Correctional Facility.

   Via letter dated June 2, 2004, received on June 9, 2004, Leslie was being suspended ten (10) working days effective July 19, 2004 to and including July 30, 2004. Leslie was being suspended for violations of the Standards of Conduct. Specifically as the Supervisor, knowingly allowing subordinate staff members to possess and utilize contraband items in the housing unit. For also allowing staff to bring in excess food items to work in the housing unit with contraband items such as a hot plate and pan.

   The Employer has violated Section 11, 14, and 58 of the Collective Bargaining Agreement by failing to have just and proper cause when they suspended Leslie.

b. REMEDY SOUGHT:

   The Employer shall rescind the suspension of Mr. Leslie, make him whole, remove all related documents and notes from all personnel and employment files, and comply with the above-cited sections of the contract.

On November 1, 2004, Mr. John F. Peyton, Jr. advised the Union that the Employer was respectfully denying the grievance of Grievant. Employer's Exhibit 2. The

matter was subsequently set for hearing before this Arbitrator.

It is significant to note that despite the above-factual findings as well as disciplinary action being taken by the Employer against Grievant, contraband, including hot plates, continues to be an ongoing problem. On April 26, 2005 another shakedown of HCF was ordered by Warden Frank. Among the items confiscated were a box of cooking utensils, a box containing three cooking stoves – (1-burner stove; 2- burner stove, hot plate), frying pans, pots, miscellaneous cooking oil. See Joint Exhibit 3, items confiscated in Module 4, shakedown of April 25, 2005 at 0830 hours. Official orders, directives, memorandums, and briefings, with full notice of possible disciplinary action have not stopped the introduction of contraband into HCF. "Contraband has been an ongoing problem and they will only be able to minimize it." Kiaaina at 559.

VIII. THE GRIEVANT

In 1985, ACO IV Sergeant Leslie began his career with the Public Safety Department as an emergency hire. (Union Exhibit 1). He was born and raised in Honolulu and graduated from Kaimuki High School in 1982. Following a career in the hospitality industry (kitchen steward, host) he began his Corrections career, and has been employed continuously to the present time, approximately 23 years, as an Adult Corrections Officer at HCF. Leslie at 764-76.

Grievant's evaluations have generally been satisfactory or above, and his peers and co-workers have attested to his abilities and good performance of duty. Grievant has "met expectations", Brown at 172-173, was "a good sergeant" Paleka at 362, "diligent" and "outstanding," Kiaaina at 548, one of the better working sergeants at HCF, Amaral at 502.

Grievant received notice that he was promoted to Lieutenant on May 23, 2005, the first day of this Arbitration hearing. Leslie at 764. In order to become a Lieutenant, Grievant had to have a certain number of years in a supervisory capacity such as a sergeant, take a written test consisting of 133 questions and pass an oral interview. Leslie at 764.

IX. THE WORKPLACE – HALAWA CORRECTIONAL FACILITY

Halawa Correctional Facility (hereinafter sometimes referred to as "HCF") serves as a long-term prison for sentenced felons and for inmates formerly at other facilities who are deemed "dangerous." Frank at 45. The primary function of HCF is to hold long-term felons. Frank at 45-46. One of the basic covenants at HCF is security concerning felons. Frank at 47. This includes the safety, protection, and security of inmates, staff, and the general public that HCF is entrusted to serve. *Id.* An important component of that covenant is to restrict the entry of contraband into HCF. *Id.*

The correctional officers at HCF are expected to adhere to the Standards of Conduct, policies, procedures, and directives from the office of the Warden, the Chief of Security, and the institution division administrator. Frank at 46. The Standards of Conduct were generated by Director Harold Falk for the Department of Corrections. *Id.* It has been given to all employees to whom the Standards of Conduct apply. *Id.*

As of May 20, 2005 there were 1,239 inmates at HCF and 321 staff positions at HCF. *Id.* Approximately 309 of the staff positions have been filled. *Id.*

At the medium facility there are four modules. Frank at 68. Module 3 is located in the medium facility. *Id.* There are approximately 200 plus inmates in module 3. *Id.* A module is a secured living area where inmates who are in the care and custody

of HCF live. Frank at 67; Amaral at 490-491.

Staff members are entitled to a meal. Frank at 66. Staff can cook in the housing modules using a microwave, toaster, and coffee maker. *Id.* They cannot cook in the housing modules using contraband items such as a hot plate or pan. Staff can also eat at the staff dining area and the inmate dining hall. *Id.* The inmate dining hall is directly across from the housing units. Frank at 67.

The chain of command at HCF is similar to a para military command. Within the command are ACOs. Andrade at 654. An ACO is a recruit. *Id.* After a year ACOs are reallocated to the rank of ACO III. *Id.* Next is ACO IV which are supervisors who are referred to as sergeants. *Id.* An ACO V holds the rank of Lieutenant. *Id.* As ACO VI holds the rank of Captain. *Id.* Last is the Chief of Security, who is considered an ACO VII. *Id.* The top person is the Warden. *Id.*

X. CONTRABAND POLICY

The Employer has a right to supervise its employees and keep contraband outside of HCF. The HCF contraband policy is set forth in part in the CONTRABAND MEMO. The several reasons for this policy are set forth in the testimony of the witnesses. The primary reasons given were to prevent fires, to protect staff and inmates, to comply with Fire Department concerns, to prevent escapes, and to prevent situations such as the Bartalona Escape and the Moisa Incident. Hot plates have **always been considered contraband** and they have never been approved by Warden Frank, Warden Frank's predecessor Warden Nolan Espinda, nor deputy Wardens Eric Tanaka or Randy Asher. Frank at 62-63.

Captain Dallen Paleka has been employed at HCF for 17 years. Paleka at

323. He testified that hot plates are considered contraband. Paleka at 333; 336. Captain Paleka further testified that when he first started at HCF, they had hot plates. Paleka at 336. However, Warden Nolan Espinda found out some guys had a hot plate and told them they were not supposed to be cooking and they should not have hot plates. Paleka at 336-337. Hot plates were clearly not allowed under Warden Nolan Espinda (Paleka at 344) and a hot plate cannot be used to reheat food. Paleka at 351-352. Lt. Francis Hun (called as a witness for the Grievant) has worked at HCF for approximately 22 ½ years. Hun at 622. Lt. Hun testified that hot plates have never been authorized. Hun at 630. Sergeant Kiaaina has worked for HCF for 17 years. Kiaaina at 504. Kiaaina supported Warden Frank's testimony when he asserted that he does not believe any of the Wardens have authorized hot plates. Kiaaina at 560. Grievant himself acknowledged that hot plates were not permitted by Warden Frank or Warden Espinda. Leslie at 824. However, Grievant did not agree that they were contraband because they were there before him. *Id.* Leslie at 824. ACO Patrick Sonsona has been employed there since 1991 at HCF. Sonsona at 964. ACO Sonsona testified that cooking with hot plates is impermissible and done "behind doors." Sonsona at 965. Captains were not aware of the cooking. Sonsona at 966. Some Lieutenants knew. *Id.* Cooking was not announced because cooking was not permitted. *Id.* Cooking was done "clandestinely." Sonsona at 967. A hot plate was out of the question since they were a safety hazard and could start fires. Sonsona at 969. In short, several witnesses testified that a hot plate was considered contraband. Not one witness testified that hot plates were not considered contraband.

The contraband policy also includes "excessive food items" (more

than enough for individual consumption). Please see Employer's Exhibit 5 at 65-66 which is set forth above in full.

XI. DID THE EMPLOYER VIOLATE SECTION 11 OF THE UNIT 1 COLLECTIVE BARGAINING AGREEMENT?

Section 11.01.a of the Unit 1 CBA provides that A[a] regular employee shall be subject to discipline by the Employer for just and proper cause.@ Joint Exhibit 1. The CBA contains no definition of Ajust and proper cause@ and, as a result, an Arbitrator is free to fashion his own definition of what constitutes Ajust and proper cause.@

The primary issue in the case before this Arbitrator is whether the Employer used the just and proper cause standard prior to taking disciplinary action against Grievant. If the Employer had just and proper cause, then the grievance will be denied. However, if the Employer failed to use the just and proper cause standard, then the grievance shall be sustained.

At a minimum, discharge and disciplinary actions by an employer have been reversed where basic notions of fairness and due process have not been met. AIndustrial due process@ is becoming a component of Ajust and proper cause.@ *Arkansas Power & Light Co.,* 92 LA 144, 149-50 (Weisbrod, 1989) (grievant reinstated because employer violated employee=s due process rights by denying him union representation during investigatory interview) and *Adrian College,* 89 LA 857 LA 861 (Ellmann, 1987) (employer failed to make fair investigation).

Arbitrator Carroll Daugherty suggested using a set of guidelines, to be used in disciplinary proceedings, to determine whether an Arbitrator should, Asubstitute

his judgment for that of the employer@ *Elkouri and Elkouri, How Arbitration Works*, page 884, 5th Edition, (1987) as well as to determine whether an employer has met the test of just and proper cause. Arbitrator Daugherty established a standard that has been widely accepted since its inception. *In Grief Bros. Cooperage Corp.,* 42 LA 557 (1965), and later in *Enterprise Wire Co.,* 46 LA 359 (1966). This test on discipline has been embraced in *Koven & Smith, Just Cause: The Seven Tests*, 2d Ed., revised by Farwell (BNA Books, 1992). The test was first applied in Hawaii by Arbitrator Peter L. Trask in *United Public Workers, AFSCME, Local 646, AFL-CIO and Governor George R. Ariyoshi State of Hawaii* (Grievance of Gilbert Hicks) (1984); applied again by Arbitrator Trask in *United Public Workers; AFSCME, Local 646, ALF-CIO and City and County of Honolulu, Department of Parks and Recreation* (Grievance of John Feliciano) (1990); applied by Arbitrator Barclay Bryan in *United Public Workers, AFSCME, Local 646, AFL-CIO, and State of Hawaii, Department of Education, Royal Elementary School* (Grievance of Manuel H. Pascua) (1995); applied by Arbitrator Walter H. Ikeda in *UPW v. County of Maui, Department of Public Works and Waste Management* (Grievance of Johnny Ramoran) (1996); applied by Arbitrator Jim Nicholson in *HGEA and State of Hawaii, Department of Education* (Grievance of Crown Arnold) (1994), in *United Public Workers, AFSCME, Local 646, AFL-CIO and State of Hawaii, Hawaii Health Systems Corporation, Hale Ho=ola Hamakua* (Grievance of Ailene Parel) (2001), in *United Public Workers, AFSCME, Local 646, AFL-CIO and State of Hawaii, Department of Public Safety, Halawa Correctional Facility* (Grievance of Larry Moore) (2001); and in *United Public Workers, AFSCME Local 645, of Public Workers, AFSCME, Local 646, ALF-CIO v. State of Hawaii, Department of Education, Maui School District, Lahainalua High*

School (Grievance of Francis Cosma, Jr.) (2002), applied by Arbitrator Russel T. Higa in *United Public Workers, AFSCME Local 646, AFL-CIO and Department of Health, Adult Mental Health Division Hawaii, State Hospital* (Grievance of Marvin H. L. Rowe) (2001); applied by Arbitrator Kerry M. Komatsubara in *United Public Workers Union, AFSCME, Local 646, AFL-CIO, Unit 10 and State of Hawaii, Department of Human Resources, Hawaii Youth Correctional Facility Section 11A., 11* (Grievance of Valentin Luecuona) (2001);and applied by Arbitrator Michael F. Nauyokas in *United Public Workers, AFSCME, Local 646, AFL-CIO and Hawaii Health Systems Corporation, Maluhia,* (Grievance of Edgar Esperancilla) (2002).

The guidelines for this test consist of seven (7) criterial questions against which the Employer=s conduct is judged or measured. A single negative response to any of the seven criterial questions invalidates the Employer=s action, allowing the arbitrator to substitute his own judgment. These criterial questions include the following:

> (1) NOTICE. Did the Employer give the Employee forewarning for or foreknowledge of the possible or probable disciplinary consequences of the Employee=s conduct?
>
> (2) REASONABLE RULE AND ORDER. Was the Employer=s rule reasonably related to (a) the orderly, efficient, and safe operation of the Employer=s business and (b) performances that the Employer might expect of the Employee?
>
> (3) INVESTIGATION. Did the Employer, before administering discipline to an Employee, make an effort to discover whether the Employee did in fact violate or discharge a rule or order of the Employer?
>
> (4) FAIR INVESTIGATION. Was the Employer=s investigation conducted fairly and objectively?
>
> (5) PROOF. Did the Employer obtain substantial evidence or proof that the Employee was guilty as charged?

(6) EQUAL TREATMENT. Has the Employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

(7) PENALTY. Was the degree of discipline administered by the Employer in this case reasonably related to (a) the seriousness of the Employee's proven offense and (b) the record of the Employee in his service with the Employer?

The vast majority of Hawaii Arbitrators have elected to use the test set forth in *Enterprise Wire Company* for determining Ajust and proper cause.@ In addition, the closing briefs submitted by the State of Hawaii and the Union both utilized this test to determine if the "just and proper cause" test has been met. In light of the above-referenced **overwhelming authority and precedent**, as well as the fact that this test clearly and unequivocally embraces industrial due process, from the perspective of an union, an employee, and an employer, this Arbitrator will once again use the test set forth in *Enterprise Wire Company.*

XII.A. NOTICE. DID THE EMPLOYER GIVE TO THE EMPLOYEE FOREWARNING FOR OR FOREKNOWLEDGE OF THE POSSIBLE OR PROBABLE CONSEQUENCES OF THE EMPLOYEE=S CONDUCT?

In this first of seven inquires, this Arbitrator must ask if the Employer established that (1) the Grievant had notice of the type of conduct which would lead to discipline; and (2) the Grievant was aware of the type of penalty which was likely to follow from the misconduct. *Koven and Smith*, *Just Cause: The Seven Tests*, 28 (BNA, 2d. 1992). At issue here is a failure to follow directives to "get rid" of contraband; specifically a hot plate. Grievant had express notice that use, possession, or permitting subordinates to use contraband items such a hot plate may result in his being subject to

progressive discipline. However for reasons discussed below, this Arbitrator does not believe that there is substantial evidence to establish that the Grievant allowed "excessive food" into HCF. Therefore, this Arbitrator will focus only on notice concerning "hot plates" (please see Section XII.E, PROOF). Grievant is familiar with the Standards of Conduct.

Grievant attended a one day training class (7:30 a.m. to 4:30 p.m.) on entitled "Standards of Conduct" on July 23, 1986. (Employer's Exhibit 9.)

In May of 2003 Grievant was suspended for 5 working days (mitigated to 3 days for timeliness) for failing to comply with the Standards of Conduct. Employer's Exhibit 10. Grievant evidently failed to comply with the Watch Commander's orders. *Id.* The letter of suspension informed Grievant that "if you again, fail to maintain these standards, you may subject yourself to further and **more severe disciplinary action**." *Id.* (Bold scoring added for emphasis).

Grievant attended a two-week training entitled "Standards of Conduct," which was conducted by Captain Hoffman on January 10, 2004. Employer's Exhibits 8 and 14 (p.3 and #8). Grievant also received a copy of the Standards of Conduct on January 10, 2004. *Id.* The Standards of Conduct provide for "Progressive Discipline." *Id.*

It is also significant to note that Grievant submitted a memo to Major Andrade, dated March 22, 2004 concerning alleged "Disparate Treatment by Captain Wallace Brown." Employer's Exhibit 14-26. In this memo Grievant specifically refers to the Standards of Conduct. Grievant states:

> I truly believe Brown feels he is beyond the Standards (SOC) and any rules governed by this administration.

Grievant was expressly advised that the hot plate constituted contraband. Prior to April 1, 2004, Grievant was informed, at the very least 4 times (see discussion in Section XII.E, PROOF), that hot plates were contraband. Given Grievant's knowledge of hot plates constituting contraband, the Standards of Conduct and the CONTRABAND MEMO, Grievant was placed on notice that while at HCF, possession of a hot plate, use of a hot plate, or allowing subordinates to use a hot plate, which constitutes contraband in HCF, may result in disciplinary action with just and proper cause. In addition, Grievant knew that the type of disciplinary action that would be assessed against him would be "progressive discipline" as provided for in the Standards of Conduct.

Notice may also be implied. *Koven and Smith*, *Just Cause: The Seven Tests*, 28 (BNA, 2d. 1992) at page 53 provides as follows.

> ***Implied Notice.*** This final form of notice is really a restatement, from a slightly different perspective, of the principle that some kinds of misconduct are so serious that no specific, formal notice is required before discipline can be imposed. The consequences of an employee's carelessly putting himself in danger, stealing company property, striking a supervisor, and the like are so patently unacceptable that employees should know that discipline is expected. Notice is "implied" by the very nature of the misconduct.
>
> Implied notice of another kind is given when an action, not specified in the rules (e.g. reporting to work under the influence of marijuana), is similar or comparable to misconduct that the prohibited (e.g. reporting to work under the influence of alcohol) that the notice of one amounts to notice of the other. But "comparability must be genuine – not a matter of wishful thinking on the company's part.

Many arbitrators have held that there are certain actions and conduct which are widely accepted as wrong and which every employee should know will not be

tolerated. Forewarning or foreknowledge is given by common sense rather than by specific rules, policies, or regulations of the Employer. In addition, discipline may be imposed without specific advance notice for socially disapproved conduct, i.e. conduct that society as a whole prohibits or disapproves of. AEmployers do not have to publish rules to prohibit conduct that is so clearly wrong that common sense would dictate that the employer would regard such as misconduct.@ *Capital Area Transportation Authority,* 77-1 ARB & 8170, 3744 (Brown, 1976). Also see Arbitrator High in 76 LA 403, 412 (formal rule not required in order to make sleeping on the job an offense), Arbitrator Keeler in 45 LA 437, 441 (Aa Company does not have to establish that it had, or that it had communicated specific rules for certain well-recognized proven offenses such as drunkenness, theft, or insubordination@) and Hawaii Arbitrator Nicholson in *United Public Workers v. State of Hawaii, Department of Public Safety, Oahu Community Correctional Center* (Grievance of Thomas Lepere) (1997) where Grievant, who was an ACO had his suspension upheld for using profanity directed toward the then acting Warden Espinda (10 day suspension reduced to 7 days for Employer failure to allow a business agent to be present during an interview). [3] Notice is implied by the very nature of the misconduct and the Union and employees cannot assert that they did not know that such misconduct could result in disciplinary action.

[3] It is significant to note that in *United Public Workers v. State of Hawaii, Department of Public Safety, OCCC (Grievance of Thomas Lepere)* the Grievant was charged with violating the Standards of Conduct, Article III, Section III, C, C4 "Conduct Toward Superiors, Subordinates and Associates-Employees shall treat superiors, subordinates, and associates with respect. They shall not be insubordinate to superiors or supervisors." Employer's Exhibit 7 that is currently in evidence, page 13 contains the exact same Article number, Section number, and subsection letter and exact same words concerning insubordination. Likewise, Employer's Exhibit 7a contains this same provision.

Therefore, assuming arguendo that there were no Standards of Conduct, insubordination is a ground in and of itself for imposing discipline.[4] In *Siemans Automotive Corporation and I.A.M.A.W. District 74*, 02-2 ARB &3212 (Cocalis, 2002) Arbitrator Cocalis found that an employer had sufficient cause to suspend a grievant a union representative, for insubordinate behavior directed at his "coach." The record disclosed that the Grievant was "rude, hostile and belligerent," and he refused to abide by instructions. In addition, uncooperative behavior as been held as a ground for termination. In *Dow Chemical Co., Texas City and Local 347 International Union of Operating Engineers, AFL-CIO*, 04-1 ARB &3669 (Chumley, 2004) Arbitrator Chumley an employer had "good and sufficient" reason to terminate an apprentice employee who strongly opposed his transfer to another department. The employee expressed his displeasure at the transfer by **being extremely uncooperative** with his co-workers and supervisor. Also, in *Cuyahoga County Sheriff and Ohio Patrolmen's Benevoleent Association*, 04-02 ARB &4022 (Szuter, 2004) Arbitrator Szuter held that an employer had just cause for terminating a corrections officer following a second incident during a single 24-hour period. The evidence showed that the officer who was involved in an incident with an inmate lied about how damage occurred to a wall in a cell block. Previously, on the same day but during an earlier shift, he had been disrespectful to a jail nurse. Given the officer's record of frequent discipline, a failure of self-correction, the repetition of dishonesty and the fact that progressive discipline had been unsuccessful, there was just cause to find that the was officer was too unreliable for continued

[4] It is significant to note that Grievant was also charged, via the Standards of Conduct, with insubordination. Nobriga at 458.

employment.

Every major witness that testified brought up the Last Supper Memo. The Last Supper Memo falls into this category of implied notice. Grievant maintains that he did not intend to offend anyone by the Last Supper Memo. However, a subordinate does not have to be informed, after being directed to submit a report on a serious matter that may involve disciplinary consequences, that writing an irrelevant, confusing, and mocking report to his superior constitutes insubordinate conduct which may result in disciplinary action. ACOs are taught to write reports (Andrade at 688-689 and Frank at 85). In regard to the Last Supper Memo:

> (1) the subject was of the report was “The Last Supper.” This was found to be offense by Warden Frank, Major Andrade, Captain Brown, and Hearings Officer Nobriga;
> (2) it implies that there have been other cooking incidents prior to the Second Hot Plate Incident;
> (3) the words “financial burdens on the State that places a burden directly to HCF food service department” is perplexing, confusing, and irrelevant as it does not relate to the Second Hot Plate Incident.
> (4) the words “meal supplement enriched with vitamins and nutrient” is also perplexing, confusing, and irrelevant to the Second Hot Place Incident.
> (5) the use of the words “unbeknownst individual” given the facts concerning the cooking appears to imply that Grievant knows the individual(s) responsible for the cooking but is not going to tell his superiors who the individual is.

However, despite the fact that the Last Supper Memo was brought up several times during four of the five days of testimony in this Arbitration Hearing and was deemed by management to be “mocking,” Grievant was not being disciplined for writing this memo, but rather for cooking and using a hot plate. Andrade at 688 and Frank at 99. Warden Frank must be correct because the suspension letter to Grievant,

dated July 2, 2004 (Employer's Exhibit 3) does not make reference to this incident in the underlying factual findings supporting a violation of the Standards of Conduct. Also, the thirteen (13) itemized Supporting Facts and Conclusions do not make reference to the Last Supper Memo. Evidently, Management did not intend to make this memo a disciplinary matter, as stated by Warden Frank. Accordingly, this Arbitrator will not use this incident to find that the Employer properly disciplined the Grievant. However, it is relevant as an example of Grievant's interaction with his superiors.

Still, Obedience to a superior's directives and policies are crucial to the operations at HCF. Frank at 89. This is particularly the case in a correctional facility. *Id.* When there is complacency or failure to follow rules, inmates can get hurt, integrity is questioned, and escapes occur. Frank at 89-90. It is particularly important for a supervisor such as Grievant to follow directives and policies because "he leads by example." Frank at 90. Grievant had implied notice that failure to get rid of the contraband hot plate (insubordination) may result in disciplinary action. Grievant, as a supervisor, was aware that the rules, policies, procedures and Standards of Conduct provide that when an order is given to him he is to follow the order. A supervisor in a correctional facility should not have to be ordered more than once to get rid of contraband.

Grievant had both expressed and implied knowledge that his failure to get rid of the hot plate and to stop his subordinates from using the contraband hot plate could result in progressive discipline. The answer to the first criterial question is answered in the affirmative (Please see Section XII. E., Proof for a more detailed

explanation).

XII.B. REASONABLE RULE AND ORDER. WAS THE EMPLOYER=S RULE OR MANAGERIAL ORDER REASONABLY RELATED TO (A) THE ORDERLY, EFFICIENT, AND SAFE OPERATION OF EMPLOYER=S BUSINESS AND (B) PERFORMANCE THAT THE EMPLOYER MIGHT PROPERLY EXPECT FROM THE EMPLOYEE?

In regard to this second inquiry, this Arbitrator must ask if the Employer established a rule that was reasonably related to the orderly, efficient, and safe operation of the Employer=s business and to the performance that can be expected of Grievant. As per *Koven and Smith*, A[f]ew propositions in labor relations are more firmly established than the proposition that the Employer has the right to make reasonable rules and give reasonable orders in the conduct of its business. *Just Cause: The Seven Tests, supra,* at 86.

The Standards of Conduct and rule against contraband such as hot plates is reasonably related and critical to the orderly, efficient and safe operations of HCF. It sets forth a code of conduct for the behavior of corrections officers. Because corrections officers are vested with extraordinary authority over citizens, they are held to a higher standard of conduct than ordinary citizens. This higher standard of conduct is consistent with the clear necessity to vest the public law enforcement institutions such as the Department of Public Safety with managerial authority in order to effectively function and execute its mission. The Standards of Conduct are also essential to assure the protection and safety of the employees, inmates, and the general public.

In regard to the Standards of Conduct, Arbitrator Tsukiyama stated as follows at page 9 of his decision:

> ...[T]he public expectation of its prison system is no less. Such higher standard is also consistent with the clear necessity to vest the public law enforcement institutions, such as police, fire, correctional, etc. with strong internal managerial disciplinary authority in order to effectively function and execute their mission. The Standards of Conduct which ensure such mission and objectives 'come with the turf' and must be considered an inherent part of the ACOs job.

State of Hawaii, Department of Public Safety, Maui Correctional Center v. United Public Workers, 646, AFL-CIO. (Grievance of Fender Aliksa) (Tsukiyama, 1997).[5]

As Warden Frank had testified, the fire department has audited HCF and notified HCF that the use of hot plates in the modules constitutes a fire hazard and should not be allowed in the housing units. Frank at 63; 101. In addition, Captain Paleka testified that as a safety officer hot plates have a better chance of causing a fire than a microwave or toaster. Paleka at 340.

A hot plate is considered contraband not merely for safety related reasons concerning staff and inmates, but also for security reasons. Warden Frank testified that tolerating a seemingly harmless item of contraband can lead to the introduction of more serious items of contraband. Frank at 63, 101. Lieutenant Hun also testified that a hot plate can be used like an iron to melt safety glass and facilitate an escape. Hun at 630. This Arbitrator agrees with Warden Frank that contraband should be nipped in the bud and not allowed to grow into something bigger and far more serious such as the Bartalona Escape (or for that matter, the Moisa Incident). Frank at 63.

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[5] Grievant, as a corrections officer, is part of an elite group of law enforcement personnel. He risks his life everyday by mingling with some of the most dangerous felons in the United States. And for this, the people whom he protects are very thankful. This is why the State of Hawaii legislature has made Intimidating a Correctional Officer a class C felony (see Hawaii Revised Statutes, Section 710-1031) and why any person who is imprisoned who causes the death of another person, i.e. inmate causes the death of correctional officer, violates HRS 707-701(e), murder in the first degree.

Given the above record, the Employer's prohibition on contraband items such as a hot plate are reasonably related to the safety, security, and operations of HCF. In addition, the directive issued by Warden Frank prohibiting the use of contraband items such as a hot plate is reasonably related to the type of performance (getting rid of the hot plate or prohibiting its use) that the Employer can expect from its staff. Accordingly, the response to the second criterial question is answered in the affirmative.

XII.C. INVESTIGATION. DID THE EMPLOYER, BEFORE ADMINISTERING DISCIPLINE TO AN EMPLOYEE, MAKE AN EFFORT TO DISCOVER WHETHER THE EMPLOYEE DID IN FACT VIOLATE OR DISCHARGE A RULE OR ORDER OF THE EMPLOYER?

The third inquiry requires that this Arbitrator ask if the Employer conducted a timely and thorough investigation to satisfy due process requirements as well as obtain adequate proof of misconduct. *Just Cause: The Seven Tests, supra,* at 159-160. Due process requires that the employee be informed promptly and in sufficient detail of the charges against him, and that the employee be given the opportunity to respond to the charges. *Id.* at 159. *Also See Gaylord Container Corp.,* 107 LA 147 (Statham, 1996); *PQ Cor*. 101 LA 694 (Pratte,1993); *Walt Disney World Co*., 98-2 ARB & 5342 (1988). As to gathering adequate proof, an employer must consider all sides of the dispute, obtain documentary evidence, and conduct the investigation in a timely manner. *Id.* at 161-179. The issue in the case before this Arbitrator is the Union=s allegations that there was no meaningful investigation.

Captain Wallace Brown III has been employed at HCF since March of 2001. Brown at 191. He started as a Lieutenant *Id.* In September 2002 he was

promoted to Watch Commander. *Id.* Prior to his transfer to HCF he was employed at OCCC for 14 years. *Id.* He started as an ACO and worked his way up to sergeant. *Id.* He was initially trained to conduct investigations for the PSD in 1992. *Id.* His training has continued to be an ongoing process. Brown at 191-192. His training has included "[e]verything from just cause to the steps that you go through, the reason why you go through those steps, fact finding. Just general investigative process." Brown at 192.

Captain Wallace Brown has also investigated "[a]ll kinds of cases, workplace violence, assaults, thefts, abandonment of post, weapons violations. You name it. I've pretty much investigated it." Brown at 193. He has done between 60 to 80 investigations. *Id.*

Major Andrade assigned Captain Brown to investigate the incident of April 1, 2004 on April 2, 2004. Brown at 196-197. The investigation concerned Warden Frank doing a walk-through and discovering that food was being cooked. Captain Wallace initially had the reports of officer Hawn, officer Smith, and Sergeant Leslie. Brown at 197. After Captain Brown obtained the reports, he began to formulate questions to determine if the alleged conduct was authorized. Brown at 197-198. He believes that after the questionnaires, he began interviews. Brown at 198. He then began to draft his investigation report, Employer's Exhibit 5. *Id.*

Employer's Exhibit 5 cites provisions set forth in the Standards of Conduct. Brown at 199. Captain Brown used the Standards of Conduct to determine if same had been violated. Brown at 199. The first three counts (G. Knowledge of Laws and Regulations, H Performance of Duty, and I Observance of Laws and Regulations) are standard in any investigation because an employee is required to be familiar with

the laws and regulations. Brown at 199-200.

Captain Brown, during his investigation, then determined if any other counts should be added to his investigation report. Brown at 200. He concluded that Count 4 concerning contraband, Count 5 concerning insubordination, and Count 6[6] concerning truthfulness should be added. *Id.*

Employer's Exhibit 5 also lists potential Witnesses. *Id.* The witnesses include Major May Andrade, Captain Dallen Paleka, UTM Richard Mello, Lt. Francis Hun, Lt. Victoria Jacob, Officer Antonio Rivera, Officer Thomas Hawn, Officer Don Smith, and Officer Troy Santos. Brown at 200-201. Although Officers Rivera and Santos did not appear to be involved in the cooking incident of April 1, 2004, Captain Brown had them each complete questionnaires given their job duties and responsibilities on said day as they were potential witnesses. Brown at 201 and 207.

In regard to the April 1, 2004 incident, Captain Brown prepared the above-cited witness list because Major Andrade was involved concerning the incident. In addition, Captain Paleka was the watch commander, Richard Mello was the manager for the housing unit that Sergeant Leslie was assigned to, Lieutenant Han was the watch Lieutenant, Lieutenant Jacob was the residency section lieutenant, and officers Rivera, Hawn, Smith and Santos were being supervised by Sergeant Leslie. Brown at 201.

Captain Brown reviewed the incident reports submitted by Grievant. He then gathered relevant documents and drafted questions for witnesses concerning the

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[6] The truthfulness count was later dropped since Grievant evidently admitted receiving various information which
he originally denied having knowledge of.

April 1, 2004 incident. Brown at 196-97. Thereafter, Captain Brown interviewed the witnesses and handed them the questionnaires. *Id.* Captain Brown, based upon his investigation, found that there was reason to believe that Grievant had violated the Standards of Conduct.

Employer's Exhibit 5 also provides for a section referred to as "ASSIGNMENT," which is used to explain the date Captain Brown received the investigation assignment (April 2, 2004), as well as a section referred to as "SYNOPSIS" which constitutes a brief statement as to what allegedly occurred and a section referred to as "SEQUENCE OF EVENTS" which explains the events that occurred concerning the alleged conduct that is subject to disciplinary action. Brown at 202.

As per Employer's Exhibit 5, directly below SEQUENCE OF EVENTS is a section entitled "FINDINGS: ARTICLE III, SECION III, Establishing Elements of Violation." Five pages of the investigation report are dedicated to this section. After this section is a section entitled "Factual Summary." This is the section of the investigation report where Captain Brown set forth what he discovered during his investigation and whether there may or may not be a violation. Brown at 203.

The last part of the Investigation Report (Employer's Exhibit 5) concerns Captain Brown's "CONCLUSION." Brown at 203. Each count addressed in this section was also listed at the beginning of Captain Brown's report. Brown at 203. The conclusions indicate that Captain Brown believed that Grievant may have been in violation of each of the six counts listed on pages one and two of his investigation report. Brown at 204. Captain Brown did not make a determination as to whether

Grievant had or had not violated these sections as this is not his job. *Id*. Captain Brown does not make a finding of wrongdoing. *Id*. He investigates and the Hearings Officer has the responsibility of determining if there is a violation. Brown at *Id*.

The cooking incident concerning Grievant occurred on April 1, 2004. Captain Wallace Brown III was promptly assigned to investigate said incident by Major Andrade on April 2, 2004. Employer's Exhibit 5-12. The record indicates that the investigation began and concluded before any disciplinary action was taken against Grievant. Captain Brown completed his investigation report and provided a copy of said report to Warden Frank via Major Andrade.

The investigation was promptly begun on April 2, 2004 and completed on April 30, 2004. All potential witnesses were contacted and asked to provide statements. Captain Brown considered all sides of the dispute, obtained documentary evidence, and conducted the investigation in a timely manner.

During the Arbitration hearing, Grievant's allegations of prejudice and discrimination were asserted. Captain Brown also testified in his defense stating that he had not personal animus against Grievant and that he conducted his investigation fairly and objectively. Brown at 254. This Arbitrator believes the testimony of Captain Brown and does not believe that Captain Brown was prejudiced or partial against Grievant during his investigation of the April 1, 2004 contraband incident.

The personal issues alleged between Grievant and Captain Brown evidently were the result of Captain Brown removing Grievant from an investigation that Captain Brown had assigned Grievant to investigate. In addition, Grievant made

requests of Captain Brown for training. Captain Brown informed Grievant that he would forward Grievant's requests to management. However, Captain Brown refused, as demanded by Grievant, to provide a written response to Grievant's request. Thereafter, Grievant filed a written complaint against Captain Brown to Major Andrade, dated March 22, 2004, concerning disparate treatment by Captain Brown. Grievant also referred to Captain Brown as Grievant's subordinate. Employer's Exhibit 14-26. Please note that this Exhibit is also cited above to support this Arbitrator's conclusion that Grievant had notice that his conduct may result in discipline.

On March 22, 2004, Grievant received a letter from Deputy Warden Randy Asher (Employer's Exhibit 14-29) concerning Grievant's letter of March 22, 2004 to Major Andrade.

> The letter provides in relevant part as follows:
>
> Your memorandum dated March 22, 2004 addressed to COS May Andrade has been referred to me for response since I am quite familiar with the subject matter on 12/05/02. The issues you have raised appear to be a continuation of events regarding allegations of disparate treatment by Captain Wallace Brown.
>
> First of all, allow me to clarity the facts of 12/5/02. Your investigation was utilized under my direction overruling [then] COS Saia Finau which he initially had a right to overrule your investigation by assigning Sgt. Allan Robino to do an investigation. Subsequently, Captain Brown was assigned by me to conduct an investigation on inmate James Jin's allegation of being assaulted by Lt. Jon Baker versus your case where inmate James Jin was the alleged assaulter. These are the facts and your **focus on Captain Brown on these issues is erroneous**.
>
> Your investigate type questionnaire dated 12/5/02 with an **ultimatum to Captain Brown is out of line** on your part and; therefore, does not require a response which was directed by me through Captain Brown, besides, you were not assigned investigator to investigate Captain Brown. Furthermore, I responded to you in the same manner as you have given

me the same investigative type questionnaire.

In regards to 6/23/03, on 3/12/04 in your own words, your were told by Captain Brown that he forwarded your request to his supervisor. For you to continue to **badger Captain Brown** to receive a written response after giving you a verbal response is unreasonable on your part especially when it is not required for him to do so. You have to keep **things in perspective**. **You are not his supervisor**. Furthermore, providing training on statutes, administrative rules, and P&Ps is not a requirement. There is nothing wrong with anyone seeking an answer to something they do not understand of what they read and we will make an attempt to explain to you or refer you to someone that can provide an answer.

In conclusion, **not receiving a written response from Captain Brown to you is not disparate treatment** nor have you provided any evidence that would substantiate disparate treatment.

(underscoring and bold print provided)

If Employer's Exhibit 14-29 and the comments contained therein had been directed at Captain Brown rather than Grievant or if Captain Brown had been disciplined or some other serious action were taken against Captain Brown due to Grievant's complaint, this Arbitrator would have given Grievant's argument concerning Captain Brown being a prejudiced investigator more consideration. However this was not the case. As noted above, the issues between Grievant and Captain Brown were laid to rest by Deputy Warden Randy Asher's letter, which placed Grievant, not Captain Brown in light that is substantially less than flattering.

Captain Brown considered all sides of the dispute, obtained documentary evidence, and conducted his investigation in a timely manner. In addition, Captain Brown's investigation was not biased or prejudiced. This Arbitrator finds that the answer to this criterial question is answered in the affirmative.

XII.D. FAIR INVESTIGATION. WAS THE EMPLOYER'S

INVESTIGATION CONDUCTED FAIRLY AND OBJECTIVELY?

The fourth of the seven inquires for just cause concerns the focus of an objective posture of an employer during its investigation. In his notes, Arbitrator Daughtery explained the inquiry in this way:

> Note 1: At said investigation, the management official may both >prosecute= and >judge= but he may not also be a witness against the employee.
>
> Note 2: It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving commonly accepted meaning to the term in his attitude and conduct.
>
> Note 3: In some disputes between an employee and a management person there are no witnesses to an incident other than the two immediate participants. In such cases, it is important that the management Ajudge@ question the management participant rigorously and thoroughly, just as an actual third party would.

In addition, Industrial due process requires management to conduct a reasonable inquiry or investigation before assessing punishment. *Southern Frozen Food,* 107 LA 1030 ((Giblin, 1996); *Express River Casino Corp*.,97-1 ARB & 3009 (Berman, 1996).

The investigation report, completed by Captain Wallace R. Brown III (Employer's Exhibit 5) appears to have met this test. Captain Brown did not act as either prosecutor of judge and was not a witness to the event of April 1, 2004. In addition to his report, it was not his responsibility to determine wrongdoing. Brown at 204. That was the job of detached Hearings Officer Shelly Nobriga. *Id.* Hearings Officer Nobriga assumed and conscientiously performed the judicial role, giving commonly accepted meaning to the term in her attitude and conduct.

Hearings Officer Nobriga has a bachelor's degree in the school of social

work and a juris doctorate degree from William S. Richardson Law School. Nobriga at 366. She is licensed to practice law but is not practicing. *Id.* She has conducted in excess of 150 hearings. *Id*. She has been employed by the Department of Public Safety as a Employee Disciplinary Hearings Officer since April of 1986. Nobriga at 364. Prior to that she was a correctional supervisor at HCF. *Id*.

As an Employee Disciplinary Hearings Officer she is responsible for reviewing an investigation and to determine if it warrants a disciplinary hearing. Nobriga at 364. If warranted, notice of a pre-disciplinary due process hearing is sent out to the employee. The employee is offered an opportunity to present additional testimony, mitigating factors and other information as it relates to the charges. Nobriga at 365.

After the hearing, additional information is followed-up by the Hearings Officer. Nobriga at 365. A recommendation is then made to the director who would then determine to approve any disciplinary action, if warranted. Nobriga at 365.

The "Pre-Disciplinary Due Process Hearing" that Grievant received meets the minimum standards of due process. Hearing Officer Shelly Nobriga, in her letter to Grievant, dated June 2, 2004, (Employer's Exhibit 4) first provides for 9 provisions of the Standards of Conduct that Grievant allegedly violated. It then provides as follows:

To Wit:

> It is alleged that on April 1, 2004, you were the module 3 Sergeant (supervisor) for the Second Watch. It is alleged that you as supervisor knowingly allowed you subordinate staff to possess and utilize contraband items in the housing unit, which is contrary to departmental/facility policies and rules. It is alleged that you allowed your subordinate staff to bring in excess food items to cook in the housing unit with contraband items such as a hot plate and a pan.

It is alleged that you were untruthful about your statements regarding the incident and about prior conversations (between you and the Warden and/or Chief of Security), regarding the prohibition on cooking in the housing unit.

You or your union representative may request a copy of the investigation report prior to the hearing by providing a written request to me. You may contact me at 587-1415 to arrange for a convenient time for you to obtain your copy.

You are hereby ordered to appear at a pre-disciplinary hearing on Thursday, June 10, 2004 at 10:30 a.m. at the AAFES Building, 919 Ala Moana Boulevard, Suite 116. Your have the right to have a union representative and/or witnesses on you behalf present. It is your responsibility to inform your representative and/or witnesses of the hearing. If you have any documents or other materials to support your case, please bring them to the hearing. Any request for rescheduling or reasonable accommodation shall be made no later than five days prior to the hearing.

Please contact me at 587-1415, if you are unable to attend the hearing.

Employer's Exhibit 4 meets the essential elements of due process:

1. It clearly sets forth the specific standards of conduct which Grievant had been charged with violating (the Standards of Conduct based upon the underlying facts alleged immediately after "to wit").

2. It gave Grievant six (6) days to respond and prepare for the hearing.

3. It informed Grievant that he had the right to personally request, or to have a union representative request a copy of the "investigation report."

4. It informed Grievant that he had the right to have a union representative present.

5. It informed Grievant that he had the right to call witnesses on his behalf.

6. It informed Grievant that he could present documentary evidence on his behalf.

Accordingly, prior to the due process hearing, Grievant was notified of the alleged violations, the factual basis for the violations, and obtained a copy of the investigation report that was used to determine if disciplinary action should be taken against him. Nobriga at 371. Union representative Mr. Bob Mielke was also present. Grievant evidently prepared his defense and submitted documents for the hearing based upon the investigation report of Captain Brown. Employer's Exhibit 14. Grievant did not call witnesses on his own behalf. Nobriga at 383. It is significant to note that Grievant could have called ACO Hawn and ACO Smith in his defense. Evidently he elected not to call them. However, their respective statements were made part of Captain Brown's investigation. It also significant to note that both ACOs Hawn and Smith gave little more insight at this Arbitration hearing than what was provided in their respective written statements. However, if ACOs Hawn and/or Smith had stated in their respective statements or testified that Grievant had told them to get rid of the hot plate or that they should not cook with the hot plate, but instead use the microwave oven, this Arbitrator may have had a different perspective of this portion of the 7 part test. This was not the case.

The process that Hearings Officer Nobriga used was no different from the 150 cases that she handled. Nobriga at 366, 369. Prior to the hearing, Hearings Officer Nobriga also reviewed the investigation report. Nobriga at 379. The evidence of cooking was the Warden's observation of a hot plate and sausages in the frying pan. Nobriga at 380. Hearings Officer Nobriga followed up on several of Grievant's defenses, concerns

and allegations[7] including:

> (1) Hearings Officer Nobriga contacted Major Andrade concerning the "Last Supper" report and the fact that Grievant alleged that he was forced to change his report. Nobriga at 387.
>
> (2) In regard to Fundraisers on HCF grounds, she checked with the Institution Division Administrator Mr. Shimoda and was informed that authorization was given for the party. Nobriga at 389.
>
> (3) A Krispy Kreme fundraiser was also authorized. Nobriga at 390.

After the pre-disciplinary due process hearing was over and she had completed her investigation, Hearings Officer Nobriga, relying on the Standards of Conduct, recommended that the director suspend Grievant for 10 days. Nobriga at 391. The director agreed. *Id*. As a result, Employer's Exhibit 3, the disciplinary letter for Gordon Leslie, was issued on July 7, 2004. Nobriga at 376. Nobriga prepared the letter that was signed by John F. Peyton, Jr. Nobriga at 376-377.

In determining the suspension period, Hearings Officer Nobriga relied upon progressive discipline and two prior suspensions. Nobriga at 377. In regard to Grievant, the first suspension involved insubordination using disparaging remarks towards a supervisor. *Id*. This disciplinary action was evidently purged. *Id*. The suspension was for three days. Nobriga at 391. Nobriga is personally familiar with that case as she handled it. *Id*. The second disciplinary action occurred in May of 2003. This again involved insubordination when Grievant failed to send subordinate staff to assist with a shakedown at the high security facility. The suspension was for 5 days mitigated to 3 days for timeliness. Given the matter before this Arbitrator, Hearings Officer

[7] An allegation was also made that the investigation was tainted by Captain Brown conducting the Investigation of Grievant's alleged misconduct. However, since Grievant admitted all of his misconduct, Hearings Officer Nobriga did not investigate this allegation. Nobriga at 388.

Nobriga decided that a 10 day suspension was appropriate given progressive discipline and the fact that Grievant had two previous suspensions of the same nature. All three involved compliance with rules, subordinates and supervisors. Nobriga at 394.

The Union has argued that Hearings Officer Nobriga should not have taken evidence after the due process hearing by interviewing Warden Frank and Major Andrade.[8] In addition, Hearings Officer Nobriga apparently took the evidence after Grievant raised certain concerns as set forth above. It is significant to note that Hearings Officer Nobriga had the entire investigation file of Captain Brown, which included statements of several witnesses, including ACOs Hawn and Smith. She apparently only spoke to those persons who she felt could shed additional light on the issues concerning Grievant. Given Hearings Officer Nobriga's follow-up on the concerns of Grievant after the due process hearing was completed, this Arbitrator is certain that if Grievant had asked Hearings Officer Nobriga to speak to ACOs Smtih and Hawn concerning a legitimate defense, she would have done so. For example, if Grievant had informed Hearings Officer Nobriga that ACOs Smith and Hawn were not telling the truth, this Arbitrator believes that she would have spoken to them personally, just as she did with Major Andrade and Warden Frank. In addition, Grievant was free to call ACOs Smith and Hawn as his own witnesses. He evidently chose not to.

The Union has argued that Hearings Officer Nobriga improperly considered a "purged" disciplinary action" in determining the penalty for Grievant. Hearings Officer Nobriga evidently was unaware of how Section 17 of the CBA should

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[8] However, it has also argued that Hearings Officer Nobriga should have interviewed ACOs Smith and Hawn. It must therefore be permissible for Hearings Officers to take such evidence after a due process hearing.

be interpreted. For example, she innocently volunteered that the first disciplinary action against Grievant was purged, that this data is purged every two years, and that she does not know were the data goes. Nobriga at 447. This Arbitrator had an opportunity to observe the demeanor and testimony given by Hearings Officer Nobriga. This Arbitrator, from his observation of the Hearings Officer Nobriga's testimony as well as a review of the transcripts believes that Hearings Officer Nobriga genuinely believed that she could have use the purged offense since she was the Hearings Officer who handled the purged disciplinary action. She did not appear to be intentionally considering evidence (concerning a penalty for Grievant) with knowledge that it was impermissible to do so.

Section 17 of the CBA provides as follows:

> Section 17 Official Personnel File.
> 17.01 EXAMINE AND COPY.
>
> 17.01a. The Employee and/or the Union shall by appointment, be permitted to examine the Employee's personnel file.
>
> 17.01b. The Employee and the Union shall, upon receipt, be given a copy of the material in the file.
>
> 17.02 PLACEMENT AND EXPLANATION.
>
> 17.02a No material derogatory to an Employee shall be placed in the Employees personnel file unless a copy is provided to the Employee.
>
> 17.03 DEROGATORY AND HISTORY.
> 17.03a. An Employee and/or the Union may request that derogatory material not relevant to the Employee's employment be destroyed after two (2) years.
>
> 17.03b. Derogatory material is defined as material that is detracting from the character or standing of an Employee, expressive of a low opinion of an Employee, degrading, belittling, contemptuous, disparaging, negative,

uncomplimentary, and unflattering.

17.03c. The Employer will determine whether the material is relevant and will decide whether the material will be retained or destroyed from the personnel file. The decision to retain the material shall include the reasons and shall be in writing.

17.03d. The decision of the Employer shall be subject to Section 15 and processed at Step 2 of Section 15.

17.03e. The Employee's employment history record shall not be altered.

In *United Public Workers, AFSCME, Local 646, AFL-CIO and Benjamin J. Cayetano, Governor and James Takushi, Director, Department of Human Resources, State of Hawaii*, 6 HLRB 96 (Decision 409) (2000) the Hawaii Labor Relations Board addressed Section 17 of Unit 1 and Unit 10 agreements. In this case, the State of Hawaii began to replace Job Performance Reports (JPR) with a Performance Appraisal System (PAS) report. Under the PAS system, supervisors were permitted to record and retain "derogatory information" on specific incidents of outstanding and/or substandard work performance of employees outside of the employee's official personnel file during the period of the performance appraisal and indefinitely within the official personnel file.

The provisions analyzed by the Hawaii Labor Relations Board were very similar to the ones set forth above in Joint Exhibit 1. Sections 17.01 and 17.02 afforded employees the right to examine, review, and comment on such derogatory materials as follows:

17.01 An employee covered hereunder shall, on his request and by appointment, be permitted to examine his personnel file. An employee may be given a copy of any material in his file if it is to be used in connection with a grievance or a personnel hearing.

17.92 No material derogatory to an employee covered hereunder shall be

> placed in his personnel file unless a copy of same is provided to the employee. The employee shall be given an opportunity to submit explanatory remarks for the record. (Emphasis added).

The Hawaii Labor Relations Board, at page 98 of its decision stated as follows:

> The use by the State of Hawaii of any "derogatory" information regarding a Unit 01 or Unit 10 employee which is not maintained in the official personnel file in accordance with Section 17 has been strictly prohibited. *In the Matter of the Arbitration Between United Public Workers, AFSCME, Local 646, AFL-CIO and State of Hawaii, Department of Personnel Services* (Class Grievance Re Use of Black Books*)* (Wayne Yamasaki, April 5,1993). In S.P. 93-0162 in the Circuit Court of the First Circuit, the Court found the Department of Health in contempt for noncompliance with Arbitrator Wayne Yamasaki's decision regarding the retention of "black books" and "secret files."

The Hawaii Labor Relations Board also addressed Section 17.03 of this CBA. (This section is very similar to Section 17 of Joint Exhibit 1). *Id*. It provided as follows:

> An employee may request that any derogatory material not relevant to his employment be reviewed and destroyed after two (2) years. The employee's department head will determine whether the material is relevant and will decide whether the material will be retained or removed from his personnel jacket. Any decision to retain the material shall include reasons and shall be in writing. The employee's employment history record shall not be altered. The decision of the department head shall be subject to the provisions of Section 15. GRIEVANCE PROCEDURE, and be processed at Step 2 (Emphasis added).

The Hawaii Labor Relations Board went on to indicate that such materials, including past disciplinary actions, should be removed and expunged from the official personnel file. The Hawaii Labor Relations Board stated at page 98 of its decision as follows:

> In 1995 Arbitrator Ted T. Tsukiyama held that the State of Hawaii is required under Section 17.03 to remove and expunge all entries and references to past disciplinary actions (more than two years old) from SF-5 forms of a bargaining unit 01 employee, in addition to the removal of disciplinary letters which the parties considered to be "derogatory materials." *In the Matter of the Arbitration Between State of Hawaii, Department of Human Services and United Public Workers, Local 646* (Grievance of Dryden Kalaaukahi) (12/11/05, Tsukiyama).

The HLRB concluded at page 101 of its decision that the PAS system constituted a material change in working conditions. The HLRB found that the Employer had committed an unfair labor practice by willfully violating Section 89-13(a)(5) by refusing to negotiate with the UPW over terms and conditions relating to (1) the non-disciplinary termination and other adverse personal actions for substandard performance, (2) the maintenance of supervisory discussion notes outside of the employee's personnel file, and (3) the retention of supervisory discussion notes containing derogatory materials for a period exceeding two years.

Given *In United Public Workers, AFSCME, Local 646, AFL-CIO and Benjamin J. Cayetano, Governor and James Takushi, Director, Department of Human Resources, State of Hawaii*, 6 HLRB 96 (Decision 409) (2000) Hearings Officer Nobriga should not have used the purged disciplinary offense in determining, under progressive discipline, the appropriate penalty for Grievant. Accordingly, using progressive discipline, this Arbitrator will assume that Grievant has only one previous disciplinary action, a five day suspension mitigated to three due to timeliness.

Lastly, the Union has argued that Hearings Officer Nobriga did not have enough evidence to sustain her findings. Reasonable people have different views concerning findings of fact and conclusions of law. That is why the parties are currently

before this Arbitrator. While this Arbitrator does not agree with all of the factual findings and conclusions of law that Hearings Officer Nobriga determined, for example, her finding on that Grievant allowed his subordinates to bring food into HCF or her finding that the food was “excessive food,” this Arbitrator believes that she provided a fair and objective investigation for the Grievant that meets the minimum standards of due process.

In regard to Note1 above, Hearings Office Nobriga, as a management official, evidently acted as both a prosecutor and judge, but she did not act as a witness against the Grievant. This is permissible under this test. Hearings Officer Nobriga did not violate this sub-portion of this test.

In regard to Note 2: It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving commonly accepted meaning to the term in his attitude and conduct. Hearings Officer Nobriga did not violate this sub-portion of this test. She was a detached management official who provided a fair hearing for Grievant and also investigated concerns raised by Grievant after the pre-disciplinary due process hearing was completed.

In regard to Note 3: In some disputes between an employee and management person there are no witnesses to an incident other than the two immediate participants. In such cases, it is important that the management Ajudge@ question the management participant rigorously and thoroughly, just as an actual third party would. This portion of the test does not apply as this is not a simple dispute between two participants, i.e. Warden Frank and the Grievant. Additional witnesses

included ACOs Hawn and Smith as well as Chief of Security Major Andrade.

The investigation conducted by Captain Brown and Hearings Officer Nobriga was done fairly and objectively. The minimum requirements of due process having been met, this Arbitrator finds that the criterial question for this portion of the test is also answered in the affirmative.

XII.E PROOF. DID THE EMPLOYER OBTAIN SUBSTANTIAL EVIDENCE OR PROOF THAT THE EMPLOYEE WAS GUILTY AS CHARGED?

The fifth inquiry concerns whether the Employer disciplined the Grievant as a result of finding solid evidence of wrongdoing. The quantum of proof required was described by Arbitrator Daugherty as follows:

> [I]t is not required that the evidence be conclusive or >beyond all reasonable doubt.= But the evidence must be **truly substantial and not flimsy**.

Enterprise Wire Company, 46 LA 459, 364, note 1 (1966) (Emphasis added).

Additionally, it must be proven that the following three requirements have been met: (1) a proper charge; (2) proof of the misconduct charged; and (3) proof of the charge must be made at the time of the discipline. *Just Cause: The Seven Tests, supra,* at 241, 243, and 247.

The Employer, by letter dated on July 2, 2004 (Employer's Exhibit 3), suspended Grievant for ten working days for violating various provisions of the Standards of Conduct. The letter of suspension set forth the primary following factual findings against Grievant as the underlying basis for violating the standards of conduct:

> On April 1, 2004, you (Leslie) were the Module 3 Sergeant (supervisor) for the Second Watch. You as the supervisor knowingly[9] allowed your subordinate Staff to possess and utilize contraband items in the housing unit, which is contrary to departmental/facility policies and rules. You allowed your subordinate staff to bring in excess food items to cook in the housing unit with contraband items such as a hot plate and a pan.

This underlying basis consists of two different factual findings. Both concern the incident of April 1, 2004 in which Grievant was the supervisor for the Second Watch. This Arbitrator believes, for reasons stated below, that there is substantial evidence to support the First Factual Finding, but does not believe that such evidence exists concerning the Second Factual Finding.

The first factual finding (hereinafter sometimes referred to as the "First Factual Finding") is expressly stated as follows:

> You as supervisor knowingly allowed your subordinate Staff to possess and utilize contraband items in the housing unit, which is contrary to departmental/facility policies and rules.

The second factual finding (hereinafter sometimes referred to as the "Second Factual Finding") is expressly stated as follows:

> You allowed your subordinate staff to bring in excess food items to cook in the housing unit with contraband items such as a hot plate and a pan.

In regard to the First Factual Finding and the Second Factual Finding, Grievant evidently had a motive (four primary reasons) to allow ACOs Hawn and Smith to violate the Standards of Conduct via using a hot plate. First, Grievant evidently

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[9] Black's Law Dictionary, 6th Edition, 1990 defines the word "knowingly" as "with knowledge, consciously; intelligently; willfully, intentionally. An individual acts "knowingly when he acts with awareness of the nature of his conduct. *State v. Knoll,* Mo App. 683 S.W. 2nd 78, 81. Act is done "knowingly" or "purposefully" if it is willed, is product of conscious design, intent or plan that it be done, and is done with awareness of probable consequences. *Horne v. State, Ind.,* 445 N.E. 976, 978. (Underscoring provided).

A Person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (2) he is aware that it is practically certain that his conduct will cause such a result. Model Penal Code, Section 2.202. (Underscoring provided).

believes that he is not the only one that cooks at HCF. Leslie at 775. Second, Grievant believes that the Standards of Conduct are invalid. Leslie at 808; Union's Exhibit 13; Employer's Exhibit 14 Third, Grievant evidently believes that Warden Frank's CONTRABAND MEMO is invalid because it was not approved by the Union. Leslie at 839. That is why Grievant evidently threw the CONTRABAND MEMO away. *Id*. Lastly, Grievant has asserted that he "would inform them to whatever policies and procedures that we run in the facility. And if there's no policy procedure, why should I tell them you cannot have it, cannot have this." Leslie at 836. In other words, Grievant would inform his subordinates of policy procedures only if he believed the policy was valid. These reasons also evidently led Grievant to decide that he was not going to inform ACOs Hawn and Smith that they could not use the hot plate. Leslie at 834-835.

In regard to the First Hot Plate Incident, Warden Frank and Chief of Security Major Andrade while conducting a walk-through of HCF sometime in late January of early February of 2004 observed an inmate frying an egg in frying pan over a hot plate and using a spoon in Module 3. Frank at 60; Andrade at 667-68. Grievant was assigned to module 3. Andrade at 675. Warden Frank instructed Major Andrade to determine who authorized the cooking and to take appropriate action. Frank at 61.

Major Andrade informed Grievant that cooking will not be condoned in the housing module and directed the Grievant to "get rid" of the hot plate and pan. Andrade at 669-70. Although Major Andrade testified that hot plates were considered contraband, the record is unclear as to whether she conveyed this to the Grievant. *Id*. However, Grievant did not convey to Major Andrade that he did not know that the hot

plate was contraband. Andrade at 754. Major Andrade also informed the Grievant that "there will be no more warnings." *Id*. In addition, she testified that she did not intend for the warning to be a disciplinary action and that her "warning" was not intended in the future to be used as disciplinary action against Grievant. Andrade at 724. Major Andrade did not inform Grievant that if she sees this type of activity happening again, disciplinary action would be taken. Andrade at 725. However, Major Andrade assumed that given the fact that the Grievant was a sergeant, Grievant would get rid of the hot plate as instructed. She also assumed that such an incident would not happen again. Andrade at 671 and 752-753.

Major Andrade, by stating that there would be "no more warnings" made it clear that she expected Grievant to follow her instructions. She had no reason to believe that Grievant was not going to obey her last warning. A reasonable person would assume that if there are going to be "no more warnings," then the next infraction would result in management taking steps that would constitute progressive discipline.

Later that same day Grievant evidently went to Warden Frank's office and asked him where in the policy does it state that staff cannot cook. Frank at 62, 80. Warden Frank responded by asking Grievant if he knew what contraband was. *Id*. Grievant defined contraband "almost to the T." Frank at 62, 81; Employer's Exhibit 5 at 65-66. Warden Frank informed Grievant that neither he nor any of his predecessors had authorized hot plates as **hot plates were contraband** and that Grievant was to "**was to take care of that hot plate by getting rid of it, ensure that your people don't cook.** " Frank at 62-63; 81-82. Grievant acknowledged Warden Frank's instructions and left his office. Frank at 63. Major Andrade's "no more warning" was reinforced by the directive from Warden Frank

that Grievant was to get rid of the hot plate because it was contraband and that Grievant was to ensure that his subordinates do not cook using the hot plate.

On February 12, 2004 and February 13, 2004 meetings for ACOs, Sergeants, and Lieutenants were held to discuss report writing, contraband, inmate/staff investigations, post orders, policy and procedures, and open floor discussion. Each meeting lasted approximately 1 hour. Union's Exhibit 6-7. Topics of discussion also included the prohibition against cooking and hot plates. Frank at 902; Paleka at 339-340. Grievant was assigned to the second watch. Frank at 903-904. Grievant was present at work on both of these days. Employer's Exhibit 16. Captain Dallen Paleka testified that Grievant was a one of the briefings in early February of 2004 and should have known that a hot plate was considered contraband since Grievant raised Grievant asked a question about cooking. [10] Paleka at 339-340. This briefing was additional reinforcement to Grievant that Grievant was to get rid of the contraband hot plate and ensure that ACOs under his supervision did not use the hot plate.

There were several other briefings prior to the Second Hot Plate Incident, some of which involved just Warden Frank and Grievant, some with Grievant present, and some when Grievant was either on leave or suspended. As noted above, issues discussed included contraband, security, audits, and post orders and policy and procedure.

On July 1, 2004, Warden Frank conducted another walk-through of HCF and

[10] It is significant to note that Captain Paleka is Grievant's captain. Leslie at 842. Grievant described his relationship with Captain Paleka as "gracious." Leslie at 843. They attend the same church and Captain Paleka administered Grievant's wedding 4 to 5 years ago. Leslie at 844. This entire arbitration process must be very difficult for both Grievant and Captain Paleka. Captain Paleka is Grievant's friend and most certainly would not want to see Grievant disciplined, but Captain Paleka is obligated by the Standards of Conduct to tell the truth in these proceedings.

discovered the Second Hot Plate Incident. Frank at 70-71. When Warden Frank approached Module 3A he smelled food cooking. Frank at 71. As Warden Frank entered Module 3A, he noticed ACO Hawn and two inmates. Frank at 72-74. They evidently were cooking again in the same location where cooking had occurred during the First Hot Plate Incident. Frank at 72. Warden Frank noticed a hot plate with cut pieces of sausage in a pan being cooked by ACO Hawn. Frank at 73-74. The sausage appeared "raw" to Warden Frank. Frank at 74. Warden Frank proceeded to Grievant's office (Frank at 72 and Leslie at 768) and asked Grievant if Grievant was the security supervisor. Frank at 75. Grievant acknowledged that he was the security supervisor. *Id*. Warden Frank asked Grievant if Grievant knew that cooking was taking place in the entry to the office. Frank at 75. Grievant alleged that he was not aware of the cooking. *Id*. Warden Frank also asked Grievant if the cooking going on in the office included items authorized by Warden Frank. Frank at 76. Grievant responded "no." Warden Frank also asked Grievant why cooking was occurring when Grievant was previously warned by Major Andrade to stop cooking. Frank at 76. Grievant replied because his "staff was hungry." Frank at 76. Warden Frank, from Grievant's response, assumed that Grievant knew that cooking was taking place. Frank at 76 and 79. Warden Frank informed the Grievant that Grievant needed to submit a report concerning the incident and that the Grievant needed to take care of the cooking issue. *Id*. He then exited the Grievant's office. *Id*. The underscored portion of Warden Frank's testimony indicates to this Arbitrator that Grievant knew that ACO Hawn was using a hot plate.

In addition, the Grievant informed Hearings Officer Shelly Nobriga that the

ACOs informed Grievant that they were going to reheat their food.[11] Leslie at 828. Grievant was therefore aware that "cooking" was going to occur prior to the arrival of Warden Frank. Grievant's statement to hearings officer Nobriga is inconsistent with his statement to Warden Frank that Grievant did not know that cooking was taking place in the entry way to Grievant's office. Grievant was less than truthful with Warden Frank.

Even after Grievant was informed that he would have to submit a report, he was uncertain if he informed his ACOs to get rid of the hot plate or if he permitted the use of the contraband hot plate and evidently still permitted them to use the hot plate. Leslie at 833. The following question and answer is part of the record:

> Question: Did you tell them get rid of the hot plate, that's not allowed?
>
> Answer: I'm not too sure. I don't think that was their hot plate to get rid of. Like the – Like the equipment that we use over there, the chair, the computer, that's not ours to get rid of. We all share that.
>
> And then, you know, anybody who comes in that unit they can use the microwave oven, they can use the toaster, they can sue the icebox. If there's a **hot plate over there and you guys know, it's your kuleana, you can go use that too.** It's not mine to destroy in other words. Leslie at 833-834. (Underscoring and bold print provided).

Grievant permitted the hot plate to be used despite the fact the he knew it was contraband. The Standards of Conduct, CONTRABAND MEMO, directives and polices of HCF were evidently irrelevant to Grievant if he did not believe they were valid.

In addition, Grievant was aware that hot plates constituted contraband and had notice that he should have gotten rid of the hot plate **a minimum of four times** prior to the Second Hot Plate Incident of April 1, 2004:

[11] To Grievant, there in no difference between reheating food and cooking food. Leslie at 828.

(1) The CONTRABAND MEMO, dated July 17, 2003 informed Grievant That contraband was anything not authorized by the Warden or his designee. Hot plates were not authorized for obvious reasons. They constituted a fire hazard, could be used as a weapon or to facilitate an escape. The memo also advised everyone that failure to abide by the memo could result in disciplinary action with just and proper cause;

(2) During the First Hot Plate Incident in late January or early February of 2004, Grievant was warned by Major Andrade to get rid of the hot plate and that there would be "no more warnings";

(3) During the First Hot Plate Incident, Warden Frank expressly advised Grievant to get rid of the hot plate as it constituted contraband and to make certain that his subordinates do not use the hot plate;

(4) Concerning a briefing in February of 2004, in which cooking and contraband issues were discussed, Captain Paleka testified that Grievant should have known that hot plates constituted contraband since Grievant asked a question about cooking.

Although Grievant testified that he did not attempt to discover who owned the hot plate so that he could get rid of the hot plate, Hearings Officer Shelly Nobriga testified that Grievant did not want to disclose the name of the owner of the hot plate. Nobriga at 388. Disclosure of the name of the owner is not relevant to this Arbitration. However, Hearings Officer Nobriga's testimony is relevant because it indicates that Grievant had knowledge as to who owned the hot plate and could have informed the owner to remove the contraband hot plate. This testimony by Hearings Officer Nobriga indicates that Grievant was less than truthful when he testified that he did not did not remove the hot plate, nor did he inform ACOs Hawn or Smith to remove the hot plate because Grievant did not know who the hot plate belonged to. Leslie at 883-884. This is another factor that has led this Arbitrator to believe that Grievant knew that ACO Hawn was using a contraband hot plate to prepare food during the Second

Hot Plate Incident.

In addition, Grievant failed to informed ACO Hawn and ACO Smith that they could not use the hot plate. (Leslie at 834-835; Smith at 579; Hawn at 603). Thus, ACOs Hawn and Smith could reasonably assume that the hot plate, like the other appliances, i.e. toaster, coffee maker, microwave were not contraband and could be used whenever they so determined.

ACOs Hawn and Smith apparently used the hot plate from the date of the First Hot Plate Incident up to and including April 1, 2004. Grievant, by failing to advise ACOs Hawn and Smith that they could not use the hot plate knowingly condoned their actions concerning their use of the hot plate. Given these facts, it should not have surprised Grievant that ACO Hawn was using the hot plate on April 1, 2004. Grievant knowingly allowed his subordinates, ACOs Hawn and Smith to continue to use the hot plate contrary to the Employer's rules and policies of HCF. He is therefore responsible for violating the Standards of Conduct.

The Union has argued on behalf of the Grievant that the "no more warning" by Major Andrade and the "advisement" and "directive" by Warden Frank to "get rid" of the hot plate were insufficient to put Grievant on notice that he could be disciplined for failing to get rid of the hot plate. When a superior gives a subordinate an "order," the superior does not have to use the word "order." In determining whether a superior has given a subordinate an "order," it is not merely the words used by the superior that an Arbitrator must analyze, but also the totality of circumstances relevant to the order being given. Accordingly, a reasonable person, given the circumstances as noted above would believe that Grievant was on notice that if he did not comply with the "no more warning" instruction of Major

Andrade or the "advisement " or "directive" of Warden Frank, another warning, advisement, or directive by any management official would be accompanied with disciplinary action.

Given the above facts, this Arbitrator finds that First Factual Finding supporting the conclusion that Grievant violated the Standards of Conduct has been proven by substantial evidence. As noted above, the First Factual Finding is as follows:

> On April 1, 2004 you (Leslie) were the Module 3 Sergeant (supervisor) for the Second Watch. You as supervisor knowingly allowed subordinate staff to possess and utilized contraband items in the housing unit which is contrary to departmental/facility policies and rules.

In regard to the second factual finding, with the exception of Hearings Officer Nobriga, none of the Employer's witnesses were able to affirmatively state that the food brought in by ACOs Smith or Hawn was "excessive food." Frank at 148-149; Brown at 271; and Andrade at 707-08. This Arbitrator agrees with the Union and therefore will not uphold discipline based upon the allegation that Grievant allowed ACOs Hawn and Smith to possess "excessive food."

In addition, this Arbitrator does not believe there is sufficient evidence to find that Grievant allowed ACOs Hawn and Smith to <u>bring food into HCF</u>. Both ACOs Hawn and Smith testified that they regularly bring in food and each had thought the other had made the request. Captain Paleka testified that he allowed ACOs Hawn and Smith to bring in food like "clock work" but he was not at the front receiving area at the time ACOs Hawn and Smith arrived for work. Paleka at 341; Brown at 219-220; Smith at 577; Hawn at 602. There is nothing in the record to indicate that Grievant knew that ACOs Hawn and Smith failed to get permission to bring food into HCF. Grievant cannot be held responsible for ACOs Hawn and Smith bringing food into HCF under the above

circumstances. This Arbitrator agrees with the Union and will not uphold discipline based upon the allegation that Grievant allowed ACOs Hawn and Smith to bring food into HCF.

Given the fact that two major allegations (allowing ACOs to bring food into HCF and allowing ACOs to be in possession of "excessive food") are not supported by the evidence) of the Second Factual Finding is without sufficient evidence. This Arbitrator will not uphold disciplinary action against the Grievant based upon said finding. As noted above, the Second Factual Finding provides as follows:

> On April 1, 2004, you (Leslie) were the Module 3 Sergeant (Supervisor) for the second watch. You allowed your subordinate staff to bring in excess food items to cook in the housing unit with contraband items such as a hot plate and pan.

However, as noted above, Grievant was clearly in violation of the Standards of Conduct given the First Factual Finding:

The Grievant, on April 1, 2004 was the Module 3 Sergeant (supervisor) for the Second Watch. Grievant as supervisor knowingly allowed his subordinate staff to possess and utilized contraband items (hot plate) in the housing unit which is contrary to departmental/facility policies and rules.

Given the First Factual Finding, Grievant has violated 7 provisions of the Standards of Conduct. The violations as proven by substantial evidence are as follows:

> (1) Article III Section II Professional Conduct and Responsibilities, C. Cooperation – Cooperation between employees and elements of the Department is essential for effective correctional attainment. Therefore, all employees are strictly charged with establishing and maintaining a high level of cooperation. The record indicates that Grievant was uncooperative with his superiors. Grievant failed to cooperate with the directives of his superiors by having the hot plate (contraband) removed from module 3. In addition, he failed to notify ACOs Hawn and Smith that they should

discontinue to use the contraband hot plate in module 3. Grievant therefore violated this provision of the Standards of Conduct.

(2) Article III Section II Professional Conduct and Responsibilities, E7. General Responsibilities - Correctional employees shall at all times take appropriate action to identify potentially dangerous and/or serious security situations or problems. The record indicates that Grievant intentionally failed to correct dangerous or serious security situations by failing to eliminate the contraband hot plate (can cause a fire and be utilized as a tool for escape) and continued to permit the use of the contraband hot plate (failed to inform subordinates that the contraband hot plate should not be used) in the HCF living modules. Grievant therefore violated this provision.

(3) Article III Section II Professional Conduct and Responsibilities, E10 General Responsibilities – Correctional employees shall at all times take appropriate action to enforce all Federal and statutory law violations as well as departmental and branch Rules, Directives, Policies and Procedures, and these Standards of Conduct and report any violations thereof. Grievant failed to enforce the Standards of Conduct, the CONTRABAND MEMO as well as the directives, memos and policies concerning HCF. In addition, Grievant knowingly allowed a contraband hot plate to be used in module 3, a clear violation of the rules, directives, polices and procedures, and the Standards of Conduct. Grievant violated this provision.

(4) Article III Section II Professional Conduct and Responsibilities, G Knowledge of Law and Regulations – Correctional employees are expected to know those Statutes of the State of Hawaii, Administrative Rules, Standards of Conduct, and Policies and Procedures of the Department which are applicable to their functions as correctional employees. In the event of improper actions or breaches of discipline, it will be presumed that the employee was familiar with the law, rule, or policy in question. They shall seek information through superiors or fellow employees on matters which they have questions or doubts. Grievant knows the law and regulations that apply to him as a correctional officer. However, Grievant maintains that the Standards of Conduct, the CONTRAND MEMO, and the policies of HCF concerning contraband are invalid. Grievant is expected to know that these matters are valid. His insubordinate behavior led to the use of ACOs under his supervision to use a contraband hot plate. It is presumed that Grievant knew that the Standards of Conduct, the CONTRABAND MEMO and other laws, rules and policies against hot plates were enforceable despite Grievant's defense that they are invalid. Grievant violated this provision.

(5) Article III Section II Professional Conduct and Responsibilities, H

> Performance of Duty – Corrections Officers and employees shall perform their duties as required or directed by law, departmental rules or policies, or by order of a supervisor. All lawful duties required by competent authority shall be performed promptly as directed, notwithstanding the general assignment of duties and responsibilities. Grievant knowingly failed to promptly carry out his duties and the law, departmental rules and policies, the Standards of Conduct and the orders of supervisors concerning removal of the contraband hot plate in module 3. In addition, he permitted his subordinates to use a contraband hot plate. Grievant violated this provision.
>
> (6) Article III Section II Professional Conduct and Responsibilities, I Obedience to Laws and Regulations – Corrections Officers and employees shall observe and obey all laws, Administrative Rules, Policies and Procedures, and Standards of Conduct of the Department. Grievant failed to observe and obey the laws, policies and Standards of Conduct by refusing to remove the contraband hot plate and knowingly allowing ACOs Hawn and Smith to use said contraband hot plate. Grievant violated this provision.
>
> (7) Article III Section III Rules C Class Rules C4 Conduct Towards Superiors, Subordinates, and Associates – Employees shall treat superiors, subordinates, and associates with respect. They shall not be insubordinate to superiors or supervisors. Grievant was insubordinate to his supervisors by knowingly failing to remove the contraband hot plate as ordered. Grievant was warned at least 4 times prior to the First Hot Plate Incident to "get rid" of the contraband hot plate. Grievant failed to comply with the warning of Major Andrade, directive of Warden Frank, and numerous other memos and directives of the Employer. Grievant violated this provision.

Given the fact that there was a (1) a proper charge (failure to follow order to get rid of the contraband hot plate thereby violating the Standards of Conduct); (2) substantial proof of the misconduct charged (discussed herein in detail in this Section XII.E, Proof); and (3) proof of the charge was made at the time discipline was determined (discipline was made only after a full investigation, due process hearing, and review of proposed disciplinary action by Director John F. Peyton, Jr. prior to Grievant being disciplined), this Arbitrator finds that there is substantial proof that Grievant violated the "Standards of Conduct" Article III Section II Professional Conduct

and Responsibilities, C, G, E7, E10, H, I and Article III Section III Rules C Class Rules C4. The answer to this criterial question is also answered in the affirmative.

XII.F EQUAL TREATMENT. HAS THE EMPLOYER APPLIED ITS RULES, ORDERS, AND PENALTIES EVENHANDEDLY AND WITHOUT DISCRIMINATION TO ALL EMPLOYEES?

The Union argues that since only Grievant was disciplined and ACOs Hawn and Smith were not disciplined in any way whatsoever, there is clearly disparate treatment towards Grievant and the disciplinary action against him should be set aside. This Arbitrator would very seriously consider the position of the Union but for the fact that in late January or early February 2004 after the First Hot Plate Incident, Grievant was informed by Major Andrade to get rid of the hot plate and that there would be "no more warnings." She also informed Grievant that cooking in the modules was not permitted. Warden Frank also gave these same directives to Grievant. Both Warden Frank and Major Andrade gave these directives and warning to Grievant, not ACOs Hawn and Smith. Grievant did not convey this information to ACOs Hawn and ACO Smith. Grievant kept ACOs Hawn and Smith ignorant of the fact that hot plates constituted an impermissible use. It would be unfair to discipline ACO Hawn or ACO Smith for matters that they were intentionally kept ignorant of by Grievant. *See Washington County, Ohio Sheriff's Office v. Fraternal Order of Police, Ohio Labor Council, Inc*. 00-1 ARB& 3472 (Felman, 2000) where the Arbitrator held that a police detective was improperly disciplined for insubordination because the evidence demonstrated that he had not heard the order that he allegedly disobeyed. The answer to this criterial question must also be answered in the affirmative.

XII.G. PENALTY. WAS THE DEGREE OF DISCIPLINE

ADMINISTERED BY THE EMPLOYER IN THIS CASE REASONABLY RELATED TO (A) THE SERIOUSNESS OF THE EMPLOYEES PROVEN OFFENSE AND (B) THE RECORD OF THE EMPLOYEE IN HIS SERVICE WITH THE EMPLOYER?

In this last of the seven inquiries of just cause, the question is whether the discipline imposed is consistent with the proven offense and the grievant=s work record with the Employer.

The degree of discipline administered by the Employer in this case is consistent with the offense proven (failure to get rid of the contraband hot plate as ordered). Using progressive discipline, the Grievant has one previous disciplinary action for insubordination. The disciplinary action led to Grievant being suspended for 5 days, but mitigated to 3 days for timeliness. It is not illogical or without reason to assume, given progressive discipline, that the Employer's next penalty imposed would be for 10 days.

Therefore, the next question that this Arbitration must answer is was the Degree of discipline administered by the Employer reasonably related to the record of the employee in his service with the Employer? Hawaii Arbitrators have consistently looked to see if there appear to be mitigating factors, particularly in cases of insubordination, that would justify a reduction of the penalty imposed by the Employer. Other Mitigating circumstances that Hawaii Arbitrators have used to reduce a disciplinary penalty include a Grievant's work record, length of employment, remorsefulness, illness, disparate treatment, antiunion discrimination, management also being at fault, due process violations, Weingarten violations, lax enforcement of polices, and delays in assessing discipline. None of these mitigating circumstances are

substantial enough to apply to Grievant's disciplinary penalty. Grievant's work record and length of service (usually considered by Management before assessing a penalty), while mitigating factors in a general context are insufficient to offset his 10 day suspension given the following:

(1) The current offense is Grievant's second offense concerning insubordination;

(2) Grievant's testimony indicates a lack of remorsefulness and acceptance of responsibility for his failure to get rid of the contraband hot plate as ordered and for permitting ACOs under his supervision to continue to use the contraband hot plate;

(3) Grievant's testimony at the Arbitration hearing was inconsistent with the testimony that he provided to Hearings Officer Shelly Nobriga concerning his knowledge of who owned the hot plate (did not want to disclose who owned the hot plate to Nobriga but informed this Arbitrator he did not know who the owner of the hot plate was) and his inconsistent position concerning the Second Hot Plate Incident (informed Warden Frank that he did not know cooking was occurring but informed Hearings Officer Nobriga that ACOs informed him they were going to cook) ;

(4) Grievant's inconsistent application of the Standards of Conduct. Grievant believes that the Standards of conduct do not apply to him because they are invalid, but apparently are valid when applied to others such as Captain Brown for alleged disparate treatment;

(5) Grievant's continued position that the Standards of Conduct are invalid as well as memos and directives such as the CONTRABAND MEMO. If

Grievant continues to disregard the Standards of Conduct and the CONTRABAND MEMO, as well as similar directives and policies concerning contraband, there is a substantial likelihood that Grievant will once again be subjected to disciplinary action.

Given (1) through (5) above this Arbitrator believes that it would be inappropriate to use mitigating circumstances such as Grievant's work record to mitigate Grievant's 10 day suspension imposed by the Employer. Grievant is contributing to the contraband problem and undermining the efforts of Warden Frank to battle contraband at HCF. In addition, the discipline imposed upon Grievant is progressive. Grievant had one previous discipline for violating the Standards of Conduct (insubordination) and was given a suspension for 5 days, mitigated to 3 for timeliness (this is his only previous offense since an earlier one had been purged as per Hawaii Labor Relations Board precedent). Given the concept of progressive discipline, the next level of discipline after a 5 day suspension would logically be a 10 day suspension. Progressive discipline and the analysis as set forth above (1-5) indicate that the full ten day suspension imposed by the Employer should remain undisturbed by this Arbitrator.

XIII. DID THE EMPLOYER VIOLATE SECTION 11 OF THE CBA?

Given the 7 tests set forth *in Enterprise Wire*, supra which have all been answered in the affirmative, the Employer clearly acted with "just and proper cause" when it disciplined Grievant. The Employer did not violate Section 11 of the CBA.

XIV. DID THE EMPOLYER VIOLATE SECTION 58 OF THE CBA CONCERNING THE EMLOPYEE'S BILL OF RIGHTS?

Section 58, among other mattes of the CBA provides that A[b]efore

making a final decision, the Employer shall review and consider all available evidence, data, and factors supporting the Employee, whether or not the Employee provides factors in defense of the complaint." Grievant was clearly advised of the seriousness of the complaint lodged against him when he received the notice of the predisciplinary hearing. Grievant was given an opportunity to respond to the Complaint. The Employer, before making a decision reviewed and considered all available evidence, data and factors supporting Grievant as well as defenses to the complaint. The combination of the efforts provided by Captain Brown and Hearings Officer Nobriga ensured that Grievant's Section 58 rights were not violated. The Employer did not violate Section 58 of the CBA.

XV. PAST PRACTICE

Past practice may be used to implement general contract language, modify or amend apparently unambiguous contact language, or establish separate, enforceable conditions of employment. *Cuyahoga Community College,* 109 LA 268, 272 (Klein, 1997); *Accord Summit County Children Services*, 108 LA 517 (Sharpe, 1997). As Arbitrator Malcolm D. Talbot explained in *General Aniline & Film Corporation*, 19 LA 628, 629 (Talbott, 1952):

> [W]e acknowledge that parties' contract with reference to an existing set of practices even if they are not mention in the contract… Matters not covered by the contract may be part of the "context" of the agreement in holding major working conditions as they were.

In this sense, the "past practice" is considered an actual contract enforceable apart from any other provision, and not merely evidence of what other provisions were intended to mean. The practice becomes elevated to the status of a

contractual right:

> If a practice has established a meaning for the language in prior contracts and continued into a new agreement, the language will be presumed to have the meaning given it by the practice.

See *Mason City Sch. Dist.*, 109 LA 1125, 1129 (Hoh, 1997); *Decatur Pub. Library*, 103 LA 84, 88,89 (Green, 1994); *United Grocers, Inc*., 92 LA 566, 570 (Gangle, 1989); *City of Burlington*, *Iowa*, 83 LA 973, 976 (Traynor, 1984). Also see *Fairweather's Practice and Procedure in Labor Arbitration*, 4th Edition, pages 254 through 268.

In *State of Hawaii Organization of Police Officers*, 3 HPERB 47, 67 (1982) the Hawaii Labor Relations Board stated this rule of law as follows:

> Past Practice, to be binding on parties, must be: (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

In the case currently before this Arbitrator, the alleged past practice of cooking with hot plates is not unequivocal. Some witnesses testified that such cooking was allowed and some testified that it has never been allowed. Nor is the alleged practice clearly enunciated or accepted by both parties. The employees (as a party) or for that matter the Union and the Employer have never agreed that the use of a hot plate is an acceptable cooking tool. It appears that Warden Frank, Warden Espinda, captains, and lieutenants have always tried to enforce the rule that hot plates are contraband. In addition, it clearly was not accepted by the parties if ACOs used hot plates as long as Lieutenants or higher ranked individuals were not present or did not see the cooking and use of hot plates. The use of hot plates was evidently done "clandestinely" and "behind closed doors." Warden Frank is attempting to enforce a

policy against hot plates. The Employer has never approved of the use of hot plates. Therefore, the use of hot plates has not been clearly enunciated nor has it been accepted by both parties. There has been no "past practice" as set forth by Hawaii Labor Relations Board precedent. This Arbitrator therefore finds that there has been no past practice.

Counsel for the Union and Grievant made a very good argument concerning "lax enforcement of rules" as a basis to set aside Grievant's disciplinary penalty. However, it appears to this Arbitrator that management has always tried to enforce the rules against contraband, particularly hot plates. It appears as though only Sergeants and below partook in the use of hot plates. Lieutenants and higher appear to have to have consistently enforced rules against contraband hot plates. Under these circumstances, this Arbitrator cannot find that the Employer was lax in enforcing the rules against contraband such as a hot plate.

XVI. UNION CONSULTATION FOR POLICY PROHIBITING CONTRABAND

Section 1.05 of the CBA provides as follow:

> The Employer shall consult with the Union when formulating and implementing personnel policies, practices and any matter affecting working conditions. No changes in wages, hours, or other conditions of work contained herein may be made except by mutual consent.

Employer-Employee consultation is essential to a harmonious relationship between an Employer and Employee. In *Hawaii Nurses Association*, 2 HPERB 218 (1979), the Board discussed the duty to consult under Section 89-9(c) [12] of the Hawaii

[12] Some recent consultation cases decided by the Hawaii Labor Relations Board include *United Public Workers v. Leopardi, City and County of Honolulu, et. al.* (Decision 452, June 30, 2005); *Hawaii Government Employee's Association v. Casupang, Department of Transportation, State of Hawaii, et. al.* (Decision 453, June 30, 2005).

Revised Statutes. The Hawaii Labor Relations Board stated:

> The primary reason for a consultation provision is to facilitate the employee participation in joint decision making on substantial and critical matters affecting employee relations which are normally determined by management alone. Matters of consultation do not require a resolution of differences. 'All that is required is that the employer inform the exclusive representative of the new or modified policy and that a dialogue as to the merits and disadvantages of the new or proposed policy or change of policy take place…

Likewise, in *Jahne Hupy*, 1 HPERB 689 (1977) the Hawaii Labor Relations Board stated:

> Consultation ordinarily requires more than mere notice. Consultation contemplates asking for (and listening to) the advice or opinion of the union; it contemplates, short of requiring negotiation, deliberating together and comparing views. The purpose of consultation obviously is to required management to hear union input even on matters about which unions are not able to negotiate.

Still, consultation is not required for <u>each and every employer action</u>. However it is required for major or "substantial and critical" matters affecting employee relations. Hawaii Firefighters Association, Local 1263 IAFF, AFL-CIO, 1 HPERB 650 (1977) (Firefighters case). In the Firefighters case, the Board considered whether the creation of a Fire Fighter Trainee class was a proper subject of consultation. The Board held that it was <u>not a major policy change</u> affecting employee relations insofar as present employees in the class were not affected. However, the Board found that it was a substantial matter affecting employee relations because it introduced a separate entry-level into the firefighter series and modified existing job requirements for the Fire Fighter Class. (underscoring provided).

However, Section 15A.16b.4 of the CBA provides as follows:

> The Arbitrator shall not consider allegations that have not been alleged in Step 1.

Employer's Exhibit 14, a memorandum to Shelly Nobriga, PSD Hearings Officer from Gordon Leslie, Sergeant, Module 3 HCF, dated June 16, 2004, regarding "Documents in Support of Hearing" was admitted into evidence at this Arbitration Hearing. However, the entire document was not submitted to predisciplinary Hearings Officer Shelly Nobriga. Leslie at 857-858. Still, there is no challenge in this document that Employer should have consulted with the Union prior to enforcing Warden Frank's contraband policy (Employer's Exhibit 5-56 and 66).

In regard to Grievant's step 1 Grievance with Renee Laulusa, Employer's Exhibit 14 was not submitted to Laulusa, but Grievant did read a document to her concerning his constitutional rights being violated based upon this his allegations that the Standards of Conduct were "fraudulent." Leslie at 858. In regard to Grievant's assertion that the Employer should have consulted with the Union prior to enforcing Warden Frank's contraband policy, there is nothing in the record to indicate that such an assertion was made at Step 1.

Union's Exhibit 13, the declaration of Grievant could not have been submitted to the Hearings Officer Shelly Nobriga or Employer Representative Renee Laulusa at their Step 1 grievance meeting because it is notarized May 18, 2005. The date that the Step 1 grievance meeting evidently occurred October 15, 2004 before Union's Exhibit 13 was notarized. Employer's Exhibit 2, dated November 1, 2004, is a response to the Step 1 grievance and denies said grievance. In any event, both Employer's Exhibit 14 and Union's Exhibit 13 show Grievant focused on arguing that the Standards of Conduct do not apply to Grievant because the Union was not consulted

concerning Standards of Conduct and that Grievant as a Union member was not consulted concerning the Standards of Conduct.

There is no evidence that at Step 1 that Grievant grieved that the Employer failed to consult with the Union concerning Warden Frank's contraband policy. This Arbitrator is bound to follow the CBA of the parties. Therefore this Arbitrator cannot consider this argument, raised in the Union post-hearing brief, because it is prohibited pursuant to Section 15A.16.b.4 of the CBA for purposes of this Arbitration Hearing. See *In the Matter of the Arbitration Between United Public Workers, AFSCME, Local 646, AFL-CIO and State of Hawaii, Department of Human Services* (Class Grievance of ACLU Investigation of HYCF (BU10)) (Higa, 2004).

XVII. UNION'S EXHIBIT 13

The Rules of Evidence are not strictly adhered to in administrative proceedings such as arbitration matters. *See Alvin J. Bart & Co. V. NLRB,* 236 NLRB 242, 98 LRRM 1257, 1258 (1978). Therefore, this Arbitrator believes that a Grievant should be able to express his or her view, if logically relevant, albeit not legally relevant, to the proceeding and charges brought by the Employer, as long as this expression of opinion is **not unduly burdensome** upon the Arbitration process. Irrespective of how an Arbitrator rules, a Grievant should walk out of an Arbitration hearing feeling as if he or she had his or her "day in court." This philosophy maintains the integrity of the Arbitration process as well as promotes good relations between the Employer and the Employer's employees.

This Arbitrator permitted Union's Exhibit 13 into evidence for the reasons stated above, with the understanding that Union's Exhibit 13 represented not

the view of the Union, but that of the Grievant. Tr. at 788. Grievant alleged throughout Exhibit 13 that the Standards of Conduct were invalid because the Union failed to consult its members. [13] The evidence shows that the Employer and the Union engaged in negotiations over the adoption and implementation of the Standards of Conduct and that the Union agreed with its adoption and implementation. Union Exhibits 14-2 and 14-3.

In addition, the Grievant has argued that the Standards of Conduct were not promulgated pursuant to the Hawaii Administration Procedure Act ("HAPA"), Chapter 91 of the Hawaii Revised Statutes. However, the HAPA does not apply to the rules and procedures of a state penal institution. *Tai v. Chang*, 58 Haw. 386, 570 P.2d 563 (1977). Under the HAPA "rule" is defined to exclude "regulations concerning the internal management of an agency. HRS Section 91-1(4). The legislative history concerning the HAPA provides that policy decisions regarding **penal institutions** were considered to be regulations that involved only the internal management of these institutions. *Id*. at 387. The State of Hawaii Supreme Court in the *Tai, supra*, commented on the definition of rule as used in the HAPA. As per Standing Committee Report No. 8, 1961 Hawaii House Journal 656, stated:

It is intended by this definition of "rule" that regulations and policy prescribed and used by an agency principally directed to its staff and its operations are

[13] Grievant testified that he does not know of any member who was not consulted by the Union other than his shop steward. However, the Standards of Conduct were approved by the Employer and the United Public Workers. Compare Union Exhibit 1 and 14-2 and 14-3. In addition, counsel for the Employer and the Union informed this Arbitrator during the Arbitration Hearing that the Grievant's assertions concerning the Standards of Conduct were outside of the Arbitrator's jurisdiction and would be more appropriately addressed by the Hawaii Labor Relations Board. The Grievant's challenge to the Standards of Conduct based upon his not being consulted by his Union is most likely beyond the scope of this Arbitrators jurisdiction Tr. at 814-815 (Cook) and 817 (Masui).

excluded from the definition. In this connection your Committee considers matters relating to the operation and management of state and county **penal… institutions**… (to be) primarily a matter of "internal management" (and excluded from) this definition. *Id*. at 387. (Bold letters and underscoring provided).

Based upon the foregoing, there is substantial evidence that the Standards of Conduct are valid and enforceable and that Grievant's remedy, regarding the Employer's failure to consult with Grievant concerning the matters asserted in Exhibit 13, are not before this Arbitrator who lacks jurisdiction, but rather the Hawaii Labor Relations Board.

XVIII. CONCLUSION

The Department of Public Safety, State of Hawaii (Employer) did not violate, misapply or misinterpret the terms of the Unit 10 Collective Bargaining Agreement; specifically, sections 11, 14 and 58 when it suspended Grievant for 10 Days. Grievant was disciplined with "just and proper cause." Grievant violated the Standards of Conduct Grievant violated the "Standards of Conduct" Article III Section II Professional Conduct and Responsibilities, C, G, E7, E10, H, I and Article III Section III Rules C Class Rules C4 for the reasons set forth above in Section XII.E. PROOF.

XIX. AWARD

Based upon the foregoing findings and conclusions, the Grievance is denied.

DATED: Honolulu, Hawaii, September 22, 2005.

/S/

MICHAEL ANTHONY MARR
Attorney, Arbitrator, & Mediator
111 North King Street, Suite #314
Honolulu, Hawaii 96817
Telephone: (808) 599-5258
Facsimile: (808) 599-1545

STATE OF HAWAII)
)
CITY AND COUNTY OF HONOLULU)

On this 22nd day of September, 2005, before me personally appeared Michael Anthony Marr, to me known to be the person described in and who executed the foregoing ADecision and Award@ and acknowledged that he executed same as his free act and deed.

SEAL

/S/_____
Notary Public, State of Hawaii
My Commission expires on 05/08/08.

BEFORE ARBITRATOR MICHAEL ANTHONY MARR, ESQ.

STATE OF HAWAII

In the Matter of the Arbitration Between	)	GRIEVANCE OF GORDON LESLIE
UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,	)	CERTIFICATE OF SERVICE
Union,	)	
and	)	
STATE OF HAWAII, DEPARTMENT OF PUBLIC SAFETY,	)	
Employer.	)	

CERTIFICATE OF SERVICE

I, MICHAEL ANTHONY MARR, Arbitrator in the above-referenced matter, do hereby certify that at a copy of this Arbitrator=s decision, dated September 22, 2005, attached hereto, was duly mailed, postage prepaid, to the following persons at the addresses listed below:

Stanford H. Masui, Esq.
345 Queen Street, Suite #506
Honolulu, Hawaii 96813

Maria Cook
Deputy Attorney General
State of Hawaii
235 South Beretania Street, 15th Floor
Honolulu, Hawaii 96813

DATED: Honolulu, Hawaii, September 22, 2005.

/S/
MICHAEL ANTHONY MARR
ARBITRATOR